TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 171

HENRY C. HILL, WARDEN, UNITED STATES NORTH-EASTERN PENITENTIARY, PETITIONER

vs.

UNITED STATES EX REL. JOSEPH WEINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 8, 1936
CERTIORARI GRANTED OCTOBER 12, 1936

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1936

No. 171

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

vs.

UNITED STATES EX REL. JOSEPH WEINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Middle District of Pennsylvania	1	1
Docket entries	1	1
Petition for writ of habeas corpus	5	3
Final decree in Equity Case No. 52–30	13	7
Commitment of March 29, 1934, Case No. C95–434	22	12
Amended commitment, June 5, 1934	24	13
Bench warrant, March 30, 1934	26	14
Motion for rule to show cause	29	15
Rule to show cause	31	16
Information charging contempt and petition for rule to show cause	33	17
Memorandum of proceedings had in Criminal Case No. C95–434	58	30
Writ of habeas corpus	63	33
Response	65	34
Proceedings in Criminal Case No. 95–434:		
Exhibit 1—Commitment	74	38
Exhibit 2—Amended commitment	77	39
Exhibit 3—Order extending time	80	41
Exhibit 4—Petition for extension of time	81	41
Exhibit 5—Notice of, and affidavit in support of, motion for modification of sentence	85	43
Exhibit 6—Petition for appeal	90	46

100027—38——1

	Original	Print
Record from D. C. U. S., Middle District of Pennsylvania—Con.		
Response—Continued.		
Proceedings in Criminal Case No. 95–434—Continued.		
Exhibit 7—Order allowing appeal and assignments of error	92	47
Exhibit 8—Order and stipulation discontinuing appeal	96	49
Exhibit 9—Docket entries	99	50
Exhibit 10—Opinion of trial judge	109	56
Exhibit 11—Opinion of trial judge in Equity Case No. 52–30	135	69
Exhibit 12—Transcript of hearing on application for modification of sentence, Case No. 95–434	176	91
Opinion, Johnson, J	286	146
Order fixing bond	292	150
Petition for reargument	293	150
Exhibit A—Extracts from transcript of testimony in trial of Case No. C95–434	303	155
Order refusing petition for reargument	307	157
Petition for appeal	308	158
Assignments of error	309	158
Order allowing appeal etc	312	160
Citation and service [omitted in printing]	313	160
Praecipe for transcript of record	314	160
Clerk's certificate [omitted in printing]	318	162
Proceedings in U. S. C. C. A., Third Circuit	319	162
Order assigning judge	319	162
Minute entry of hearing	320	163
Opinion, Davis, J	321	163
Dissenting opinion, Thompson, J	328	167
Judgment	331	169
Petition for rehearing, etc	332	169
Order granting petition for rehearing	344	175
Certificate of presiding trial judge	345	175
Minute entry of reargument	346	176
Opinion on rehearing, Davis, J	347	176
Judgment	352	179
Clerk's certificate [omitted in printing]	353	179
Order allowing certiorari	354	180

1 In United States District Court, Middle District of Pennsylvania

Docket entries

Appearances:

For Petitioner: Julius I. Puente, Esq., % Palmer, Barber, Matters & Gray, 63 Wall St., New York City; Morgan S. Kaufman, Esq., Scranton, Pennsylvania.

For Respondent: Walter L. Rice, Esq., Special Asst. to Attorney General, Washington, D. C.; Herman F. Reich, Esq., Asst. U. S. Attorney, Sunbury, Penna.

Proceedings

Date:
1935

May 7—Petition for writ of habeas corpus. Order directing writ to issue returnable at Lewisburg, Pa., May 13, 1935, at 10:00 A. M. Writ of habeas corpus to issue returnable as above and handed to U. S. Marshal for service.

May 10—Order continuing hearing to May 23, 1935, at the Federal Court House at Harrisburg, Pa., at 11:00 A. M. Copies of order mailed to petitioner, respondent, and their attorneys.

2 Order directing Clerk to mail original petition to Walter Rice, Esq., Special Assistant to the Atty. Gen., to be returned on or before May 23, 1935, and petition mailed as directed.

May 11—Order extending time to file return to writ to May 23, 1935, at 11:00 A. M. Copy of Order mailed to Morgan S. Kaufman, Esq., Atty. for petitioner and to Herman F. Reich, Esq., and Walter L. Rice, Esq., counsel for respondent.

May 14—Writ of habeas corpus executed May 8, 1935, by U. S. Marshal by making service on H. J. Hendrick, Asst. Record Clerk.

May 20—Order continuing hearing on writ of habeas corpus to May 27, 1935, at 10:00 A. M. at the Federal Court House, Lewisburg, Pa., and extending time for filing return. Copy of order mailed to Herman F. Reich, Esq., Walter L. Rice, Esq., Morgan S. Kaufman, Esq., attorneys for petitioner and respondent.

May 27—Response of Henry C. Hill, Warden, by his attorney, Walter L. Rice. Respondent's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 filed.

May 27—Hearing on writ of habeas corpus.

Jun. 24—Order directing Henry C. Hill, Warden, to produce Joseph Weiner, Petitioner, at Federal Court House, Lewisburg, Pennsylvania, on June 25, 1935, at 2:00 P. M.

Jun. 25—Opinion and order sustaining petition for writ of habeas corpus, granting writ of habeas corpus, and discharging petitioner from the custody of Henry C. Hill, Warden
3 of the United States Penitentiary at Lewisburg, Pennsylvania. The above opinion and order read in open court at Lewisburg on June 25, 1935, with the petitioner, and William Goldstein, Esq., acting as his counsel, and Fred V. Follmer, Esq., U. S. Attorney, and Herman F. Reich, Esq., Asst. U. S. Attorney, being present. Upon oral motion of Herman F. Reich, Esq., that the respondent or government wished to appeal from the opinion and order handed down by the court, the court ordered the petitioner be placed on bail pending the perfecting of the appeal papers.

Jun. 25—Order directing petitioner be released on bail pending appeal.

Jun. 25—Bail in the sum of $5,000 (cash) posted with the Clerk of this court for appearance of Joseph Weiner before this court at Lewisburg, Pa., July 2, 1935, at 2:00 P. M., etc.

July 1—Order amending order of June 25, 1935, to read July 9th, 1935, at Lewisburg at 10:00 A. M., instead of July 2nd, 1935, at Lewisburg at 2:00 P. M., and extending and continuing bail of $5,000 in force until that time.

July 11—Petition for reargument by attorneys for respondent.

July 13—Order dismissing petition and refusing reargument.

July 17—Order permitting U. S. Atty. to remove exhibits from files for purpose of making copies, to be returned on or before Aug. 5, 1935.

July 9—Order for appearance of Joseph Weiner before this
4 court Aug. 5, 1935, at Lewisburg, Pa., and that the bond of $5,000 be continued in force until the time aforesaid.

July 27—Petition for appeal by Respondent. Assignment of errors.

Aug. 5—Order allowing appeal and fixing the time for filing the praecipe for the record. Citation on appeal. Order directing that bail in amount of $5,000 be furnished by petitioner, Joseph Weiner, pending appeal.

Aug. 16—Petition and order directing the clerk to retain the $5,000 cash bail, and that he be discharged from the bail bond entered on June 25, 1935.

Aug. 16—Appeal Bond in the sum of $5,000 and order of approval.

Aug. 22—Praecipe of U. S. Attorney for transcript of record. Certified copy handed Mr. Reich, Asst. U. S. Attorney.

Aug. 26—Citation returned served 8-23-35.

Aug. 26—Praecipe of U. S. Attorney for transcript of record returned served as of 8-23-35.

Sept. 20—Papers on appeal sent to Scranton for transmittal to Clerk, Circuit Court of Appeals for Third Circuit at Philadelphia. These papers held up until this time by request of Herman F. Reich, Esq., Asst. U. S. Attorney, attorney for respondent.

5 In United States District Court

Petition for writ of habeas corpus

To the Honorable, Albert W. Johnson, Judge, United States District Court, Middle District of Pennsylvania.

Your petitioner, Joseph Weiner, respectfully represents and shows:

First. That he is unlawfully, unjustly, and illegally detained and deprived of his liberty by Henry C. Hill, Warden of the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, which is located within the jurisdiction of the United States District Court in and for the Middle District of Pennsylvania.

Second. Your petitioner further shows the following facts and circumstances connected with the said unlawful deprivation of petitioner's liberty: That on or about February 6, 1932, the District Court of the United States for the Southern District of New York, by Final Decree in Equity Case No. 52-30, entitled, United States of America, Petitioner, v. The Greater New York Live Poultry Chamber of Commerce et al., Defendants, among which defendants was the petitioner herein, found this petitioner guilty of combining and conspiring "to restrain interstate trade and commerce and to monopolize interstate trade and commerce", and pronounced such "attempt to monopolize and the monopoly attained thereby, * * * [to] be, and hereby are declared illegal and in violation" of the Act of Congress of July 2, 1890, entitled, An act to protect
6 trade and commerce against unlawful restraints and monopolies.

Third. Your petitioner shows that he was, by the said Decree, "perpetually enjoined, restrained, and prohibited" from "forming, joining, aiding, entering into, or participating in any combination or conspiracy" in restraint of "interstate trade and commerce in live poultry within the Southern District of New York and in the Metropolitan Area", and from doing certain specific acts therein described, and which the Court found were in violation of the said Act of Congress.

Fourth. Your petitioner shows that on July 31, 1933, the United States Attorney for the Southern District of New York, in Criminal Case No. C95-434, entitled, United States of America, Complainant and Petitioner, v. Joseph Weiner et al., Defendants, moved the Court for a Rule to Show Cause upon this petitioner, and others, "why

they and each of them should not be adjudged to be in contempt of this Court for having violated the injunction ordered and issued by this court on February 6, 1932, in Equity Cause No. 52–30", above entitled, and "be attached and punished for the same, as prayed for in the information and petition filed in this proceedings." That the said Rule issued accordingly on August 7, 1933.

Fifth. Your petitioner shows that the Information charging Criminal Contempt, and Petition for Rule to Show Cause, filed by the United States Attorney alleged, inter alia, as follows (Section III, par. 4):

7 (a) That the petitioner herein had used his office and position in Local 440 of the Poultry Shochtim Union of Greater New York, a labor Union, "for the purpose of coercing marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8–1 of said decree" in Equity;

(b) That the petitioner herein had "threatened to cause and have caused and coerced marketmen to employ laborers in excess of their reasonable requirements, for the purpose, among others, of compelling said marketmen to buy their poultry feed exclusively from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8–g of said decree" in Equity; and

(c) That the petitioner herein had "spied upon marketmen for the purpose of ascertaining the source of their poultry feed, in violation of paragraph 8–h of said decree" in Equity.

The Information aforesaid specifically charged further as follows: (Section III, par. 5): That the petitioner herein had "visited the S. S. & B. Market at 1314 Cooper Avenue, Bronx, New York, and there ordered Samuel Weiner, a poultry marketman and one of the proprietors of the said S. S. & B. Market, to rent and/or buy coops exclusively from the New Jersey Coop Company, and to cease renting and/or buying poultry coops from other sources. Defendant Joseph Weiner threatened to injure said Samuel Weiner and the property of S. S. & B. Market in the event that Samuel Weiner and his business associates did not comply with said demands. Defendant Joseph Weiner thereafter, to-wit, on or about April 6, 1933, caused the S. S. & B. Market to be wrecked and damaged and thereby caused

8 the proprietors and employees of the S. S. & B. Market and all other persons in the poultry industry in Greater New York to be terrified and put in fear. Defendant Joseph Weiner thereby attempted to create and did create in the minds of Samuel Weiner and his business associates in the S. S. & B. Market a feeling of fear and terror for the purpose of preventing Samuel Weiner and all other persons engaged in the wholesale poultry business in Greater New York from buying, selling, or distributing live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree."

And further (Section III, par. 6): That the petitioner herein had used his position and office as an official delegate and business repre-

sentative of local 440 of the Official Orthodox Slaughterers of America, Inc., for the purpose of coercing Samuel Weiner and other marketmen to buy their poultry and other commodities necessary to the poultry business from particular sellers, in the manner described in paragraph 6 hereinabove, in violation of paragraph 8–1 of said decree. During or about the month of November 1932, defendant Joseph Weiner caused, coerced, and compelled the S. S. & B. Market to employ laborers in excess of their reasonable requirements, upon discovering that the said S. S. & B. Market was obtaining poultry coops which are used in transporting poultry to the wholesale markets, from sources other than the New Jersey Coop Company; and said Joseph Weiner thereby violated paragraph 8–g and paragraph 8–1 of said decree."

Sixth. Your petitioner shows that the prayer in the said Information and Petition was that petitioner herein should be directed
9 and required to appear before the Court "to show cause, if any there be, why they should not be attached and punished for contempts of this Court, and that upon the hearing of these charges such punishment be imposed upon the said defendants as may seem to the Court right and proper."

Seventh. Your petitioner shows that he waived a jury trial; that he was tried by the Court and on March 29, 1934, was found guilty on the foregoing paragraphs 4, 5, and 6 of the Information; that sentence was pronounced on him on the same day as follows: On paragraph 4, six months at Detention Headquarters in the city of New York, and on paragraphs 5 and 6, two years at a place of confinement to be designated by the Attorney General.

Eighth. Your petitioner shows that on June 5, 1934, the original sentence on paragraph 4 was modified to "1 year and a day in the Penitentiary, sentence on Paragraph 4 to run concurrently with sentence on Paragraphs 5 and 6." That the Warrant of Commitment dated June 5, 1934, provided for his incarceration at the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, wherein he has been confined since the date thereof pursuant to said Warrant.

Ninth. That the record of conduct of this petitioner shows that he has faithfully observed all the rules of the prison wherein he has been confined, and is not now and has never been subjected to punishment for any misconduct; that in virtue thereof, petitioner is entitled, on the date hereof, to his release from further imprisonment; that
10 the statutory penalty of six months provided for acts of the character mentioned in the said Information for Criminal Contempt, after deducting time for good behavior during confinement as aforesaid, expired on May 6, 1935.

Tenth. Your petitioner further shows that he is entitled to be discharged from further confinement under Section 22 of the Clayton Act of October 15, 1914, which provides as follows:

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. * * * but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months."

Eleventh. Your petitioner shows that no fine was assessed against him by the Court in the said Criminal Contempt Case; that the sentence of imprisonment imposed on him by the District Court for the Southern District of New York, in excess of the period of six months specified in the statute for such cases made and provided, is unauthorized and void; and that, therefore, he cannot be lawfully imprisoned further in obedience to the said sentence of June 5, 1934.

Twelfth. Your petitioner attaches hereto Certified Copies of:

(a) Final Decree in Equity Case No. 52–30;

(b) Warrant of Commitment of March 29, 1934, in Criminal Case No. C95–434;

11 (c) Warrant of Commitment of June 5, 1934, in Criminal Case No. C95–434;

(d) Bench Warrant of March 30, 1934, in Criminal Case No. C95–434;

(e) Motion for Rule to Show Cause in Criminal Case No. C95–434;

(f) Rule to Show Cause in Criminal Case No. C95–434;

(g) Information charging Criminal Contempt and Petition for Rule to Show Cause in Criminal Case No. C95–434;

(h) Memorandum of proceedings had in Criminal Case No. C95–434;

which petitioner prays be taken to be and considered as a part of this Petition.

Wherefore, to be relieved of said unlawful detention and imprisonment, you petitioner prays that a writ of Habeas Corpus, to be directed to Henry C. Hill, as Warden of the United States Northeastern Penitentiary, at Lewisburg, Pennsylvania, may issue in his behalf, to bring and have your petitioner before this Court, by which your petitioner's cause of detention may be examined and its legality investigated and determined as this Honorable Court may direct; or, in accordance with the rules and practice in such case, that a rule may be awarded against the said Henry C. Hill, as the Warden of the United States Northeastern Penitentiary, returnable to some day named, to show cause why said writ should not be issued; and the petitioner further prays that, upon the determination by this Honorable Court that the petitioner has served the sentence prescribed by statute, the petitioner be discharged from imprisonment, and

12 for such other further and different relief as this Honorable Court may deem just and proper in the premises.

Dated May 7, 1935.

JOSEPH WEINER, *Petitioner.*

[*Duly sworn to by Joseph Weiner; jurat omitted in printing.*]

13 [Clerk's certificate to following papers omitted in printing.]

In United States District Court, Southern District of New York

Equity No. 52–30

UNITED STATES OF AMERICA, PETITIONER

v.

THE GREATER NEW YORK LIVE POULTRY CHAMBER OF COMMERCE ET AL., DEFENDANTS

Final decree

This cause having come on for final hearing upon the amended petition, filed April 16, 1930, and upon the several answers thereto, and the issues thereby presented having been duly tried before the Honorable Francis G. Caffey, from November 16, 1931, to December 18, 1931;

Now upon consideration thereof, and upon motion of the petitioner, the United States Attorney for the Southern District of New York, and by Walter L. Rice and Albert J. Law, Special Assistants
14 to the Attorney General, for relief in accordance with the prayer of the amended petition; it is

Ordered, adjudged, and decreed:

1. That the court has jurisdiction of the subject matter hereof and of all parties hereto; that the petition states a cause of action against the defendants under the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209);

2. That the combination and conspiracy to restrain interstate trade and commerce and to monopolize interstate trade and commerce, and the attempt to monopolize and the monopoly attained thereby, as described in the decree and as described in further detail in the amended petition, be, and hereby are declared illegal and in violation of the said Act of Congress;

3. That each of the allegations of the Amended Petition are true, except that it has not been proved that Jacob Damsky and Sam Silverman participated in the conspiracy therein alleged and the petition as against the said Jacob Damsky and Sam Silverman is dismissed;

4. That wherever used in this decree, Metropolitan Area shall mean the cities of New York, Newark, Hoboken, Jersey City, Paterson, and other localities of the States of New York and New Jersey situated within thirty miles of the boundaries of the City of New York; marketmen shall mean wholesalers or retailers buying live poultry and selling live and freshly slaughtered poultry in markets equipped for slaughtering poultry; retail dealers shall mean persons, firms, and corporations engaged in retailing live and freshly

15 slaughtered poultry to the consuming public and to other retail dealers and butchers who occasionally purchase at retail; butchers shall mean persons, firms, and corporations engaged in retailing freshly slaughtered poultry as an incident to the retail meat business; receivers shall mean persons, firms, and corporations dealing in live poultry as commission men or agents of shippers or as purchasers from shippers, and selling such poultry to marketmen or retail dealers; conspiracy shall mean all violations of the said Act of Congress described in the amended petition and in the decree herein; poultry without any descriptive adjective shall mean live and freshly slaughtered poultry;

5. That wherever used in this decree, the term defendants shall include all of the following:

Al Berman,
Herman Berman,
Abraham Bloom,
Isidor Bloom,
Morris Bloom,
Isidore Blumenfield,
Morris Chast,
John J. Conlin,
Morris Damsky,
Harry Dworkin,
Carl Firestone,
Hyman Fishman,
Ida Frank,
Isidore Frank,
Alter Kupersmith,
Simon Lapof,
Michael Lax,
Samuel Lipkin,
Morris Markman (alias "Nigger"),
Jacob Mintz,
Abe Newman,
Hyman Raby,
Joseph Rosenman,
Julius Rosenstein,
Murray Rosenstein,
Samuel Friedman,
Charles Gershowitz,
Max Glantz,
Samuel Goldstein,
Arthur Herbert,
Charles Herbert,
Harry Herbert,
Dave Hirshon,
L. Hornstein,
Samuel Kadin,
16 Leo Kassoff,
David Kaufman (alias "David Silver"),
Max Keslin,
Sidney Rosenstein,
Harry Rubin,
Samuel Sahn,
Harry Schomer,
William Simon,
Louis Spatz,
Joseph Weiner,
Meyer Weiss,
Aaron Weissler (alias "Arke"),
Abraham Wolfe, and
Irving Yarmouth.

(NOTE.—By an amending order entered March 12, 1932, the Court added to the defendants listed in Paragraph 5 the following defendants, namely: Greater New York Live Poultry Chamber of Commerce; Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Inc.; Official Orthodox Poultry Slaughterers of America, Inc.)

6. That defendants, in violation of said Act of Congress, conspired to restrain and monopolize, attempted to monopolize, and did monopolize, interstate trade and commerce in live poultry within the

Southern District of New York and in the Metropolitan Area, by the following means among others: allocating and assigning retail dealers and butchers to the several marketmen; requiring retail dealers and butchers to purchase poultry exclusively from the respective marketmen to whom they were allocated, and preventing said retail dealers and butchers from purchasing or obtaining poultry from any other source either within the State of New York or in other States; requiring all market men doing business in the Metropolitan Area to abide by said system of allocation, and preventing said
17 marketmen from selling to retail dealers and butchers other than those allocated to them; boycotting marketmen and retail dealers who did not abide by all of the terms of the conspiracy, and preventing them from purchasing poultry from the receivers in West Washington Market, at the railroad terminals in New York and New Jersey, in States other than New York and New Jersey, or from any source whatever; preventing receivers and marketmen from selling or delivering poultry to marketmen and retail dealers who had been boycotted as aforesaid; preventing marketmen, retail dealers, and butchers who owed money for prior purchases, from purchasing, selling, loading, unloading, trucking, conveying, slaughtering, handling, or delivering poultry at any place either within or without the State of New York; causing strikes and preventing members of Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, and of the Official Orthodox Poultry Slaughterers of America, Inc., from loading, unloading, trucking, conveying, slaughtering, handling, delivering, or selling poultry for marketmen, retail dealers, or butchers who did not abide by all of the terms of the conspiracy; fixing and maintaining oppressive prices to be charged to retail dealers and butchers; dictating retail prices to be charged by retail dealers and butchers; collecting from marketmen large sums of money generally computed at approximately 1c per pound, on all poultry sold by them, and dispensing said money among themselves, to retail dealers, and to persons employed to carry out the objects of the conspiracy; and employ-
18 ing other violent, oppressive, and coercive methods in the enforcement of said conspiracy;

7. That defendants, their officers, agents, servants, employes, and all persons acting under, through, by, or in behalf of them or any of them, or claiming so to act, be and hereby are, perpetually enjoined, restrained, and prohibited (a) from doing any of the acts set forth in paragraph 6 herein, and (b) from forming, joining, aiding, entering into, or participating in any combination or conspiracy having any of the purposes, objects, or effects, or employing any of the means or methods, described in paragraph 6 herein, or having any of the purposes, objects, or effects, or employing any of the means or methods described in the amended petition;

8. That each of defendants, their officers, agents, servants, employes, and all persons acting under, through, by, or in behalf of

them or any of them, or claiming so to act, be, and hereby are, perpetually enjoined, restrained, and prohibited—

("a) from aiding, serving, or participating in any association, combination, or membership corporation of marketmen, receivers, retail dealers, and/or butchers, which has among its objects or effects: allocation of retail dealers, butchers or others, among marketmen; fixing or enhancement of prices paid to marketmen, retail dealers, or butchers; boycotting of marketmen; receivers, retail dealers or butchers; elimination of competition in the sale or distribution of live poultry; establishment of any system whereby marketmen
19 agree to act in concert to prevent any retail dealer, butcher, or marketmen from purchasing or obtaining delivery of poultry from any source within or without the State of New York, whereby retail dealers and butchers are prevented from engaging in the wholesale business, or marketmen prevented from engaging in the retail business; refusing to sell for cash to retail dealers, butchers, or marketmen, who have not paid their bills to persons or corporations other than the one concerned in the proposed purchase; agreeing or acting in concert with each other or others to fix prices to be paid to receivers;

"(b) from attempting to create, or creating in the poultry industry of the Metropolitan Area or in the minds of any persons engaged therein, a feeling of fear and terror for the purpose of preventing said persons from buying, selling, or distributing live poultry in a free, open, and competitive market;

"(c) from detaining, destroying, or damaging vehicles, or other equipment used in conveying live poultry within, into, or through the State of New York, to or from marketmen, retail dealers, butchers, or receivers;

"(d) from refusing, or instigating refusals, to load, unload, convey, deliver, slaughter, or handle poultry for any receiver, marketman, retail dealer, or butcher, wherever the rendition of such service under reasonable conditions shall be requested and the one requesting the service shall pay, or offer and be ready, able, and willing to pay or cause to be paid, therefor the fair and reasonable value thereof;

20 "(e) from coercing receivers, marketmen, retail dealers, or butchers, or any persons, firms, or corporations engaged in the live poultry business in the Metropolitan Area to make payments or contributions to any cooperative plan, association, credit organization, or any mutual association of marketmen, receivers, retail dealers, and/or butchers whatsoever;

"(f) from employing any threats, boycotts, violence, or coercive devices for the purpose of enforcing the payment of any contributions or tribute from marketmen, receivers, retail dealers, or butchers to any organization, association, corporation, or combination in the poultry industry of the Metropolitan Area; or for the purpose of in-

ducing or compelling any marketman, receiver, retail dealer, or butcher to join, cooperate with, or abide by the rules, policies, or demands of any association, corporation, or other combination in the poultry industry of the Metropolitan Area;

"(g) from causing or coercing any marketman to employ laborers in excess of his reasonable requirements, whether such coercion is effected under the guise of labor union regulations or otherwise;

"(h) from following or spying upon marketmen, retail dealers, or butchers, or their representatives, employes, or truck drivers for the purpose of ascertaining the source of their poultry supplies, or intimidating them;

"(i) from paying any money or other consideration to
21 marketmen or retail dealers for the purpose of effecting a discontinuance or lessening of their wholesale business;

"(j) from employing any device or doing any act having the purpose, effect, or tendency of recreating the conspiracy, diminishing or eliminating competition in the live poultry industry, or enhancing or fixing prices;

"(k) from restraining the freedom of any marketmen, receiver, retail dealer, or butcher in any way in purchasing, loading, unloading, trucking, conveying, delivering, slaughtering, selling, or competing in the purchase and/or sale of poultry;

"(l) from using any of the offices or positions in Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, or in the Official Orthodox Poultry Slaughterers of America, Inc., or in similar organizations, for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular sellers thereof."

9. That the term of this Court is hereby extended for five years from the date of entry of the decree herein; that the Court shall retain fully power during such period to alter the decree herein in any respect whatever.

10. That jurisdiction of this cause is hereby retained for the purpose of enforcing this decree and giving full effect thereto, punishing evasions thereof, ascertaining and correcting any deficiency or
22 injustice in any of the terms herein, making such other and further orders, decrees, directions, amendments, or modifications of this decree, and taking such other action, if any, as may be necessary and appropriate to carry out and enforce this decree.

11. That the petitioner shall recover its costs, which shall include reimbursement to the petitioner of its expenses paid or incurred, at the rate not exceeding 25 cents per folio for each folio of the transcript of testimony prepared for and submitted to the Court.

Dated New York, Feb. 6, 1932.

FRANCIS G. CAFFEY,
U. S. District Judge.

Commitment. D. C. Form No. 14 (Revised)

(Penciled: 95–434. C95–434)

In the District Court of the United States of America for the Southern District of New York, ------ Division

The President of the United States of America

To the Marshal of the United States for the Southern District of New York and to the Warden of the ------ at ------, greeting:

Whereas, at the March term of said Court, 1934, held at
23 New York, N. Y., in said district and division, to wit, on March 29, 1934, Joseph Weiner was sentenced by said Court, upon his conviction to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of six months on paragraph 4 of Information. Two years on paragraphs 5 & 6 of Information. Sentences to run concurrently and to begin upon his release from N. Y. Penitentiary, Welfare Is., N. Y., and beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; for violation of Decree E52–30 (Information in Contempt) Crim. 95–434.

And whereas the Attorney General of the United States has designated the ------ at ------, ------, as the place of confinement where the sentence of said Joseph Weiner shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Joseph Weiner and him safely transport to said Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ, and you, the said Warden, to receive said Joseph Weiner and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

24 Witness the Honorable Francis G. Caffey, Judge of said Court, and the seal thereof, affixed at New York, N. Y., in said district, this 29th day of March, 1934.

CHARLES WEISER, *Clerk.*
FRANCIS S. DAVIS, *Deputy Clerk.*

[L. S.]

Commitment. C95–434

Amended commitment

In the District Court of the United States of America, Southern District of New York

C–95–434

The President of the United States of America

To the Marshal of the United States for the Southern District of New York and to the Warden of the U. S. N. E. Pen., Lewisburg, Penna., greeting:

Whereas at the June term of said Court, 1934, held at New York City in said district and division, to wit, on June 5, 1934, the sentence of Joseph Weiner, imposed on March 29, 1934, is modified and the deft. Weiner is sentenced by said Court, to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of: One year and one day on Paragraph 4; Two years on Paragraph 5 and Two Years on Paragraph 6. Sentence on Paragraphs 4, 5, and 6 to run concurrently, and to begin when
25 sentence of State Court is ended. (Term of Court extended for 30 days after opinion of C. C. A.) beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; violation of the provisions of final decree entered by this Court on February 6, 1932, in E52–30 (Contempt).

And whereas the Attorney General of the United States has designated the U. S. N. E. Pen. at Lewisburg, Penna., as the place of confinement where the sentence of said Joseph Weiner shall be served:

Now, this is to command you, the said Marshal, forthwith to take said Joseph Weiner and him safely transport to said U. S. N. E. Pen., Lewisburg, Penna., and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said Joseph Weiner and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

Witness the Honorable Francis G. Caffey, Judge of said Court, and the seal thereof, affixed at New York, New York, in said district, this 5th day of June 1934.

[L. S.]

D. G. S.
CHARLES WEISER, *Clerk.*

26 Return

I have executed the within writ in the manner following, to wit: On Dec. 7, 1934, I delivered said Joseph Weiner to the Supt. of the Detention Hdqts., N. Y. C., temporarily pending transfer to the institution herein designated for the service of sentence, and on Dec 21, 1934, I delivered said Joseph Weiner to the Warden of U. S. N. E. Pen., Lewisburg, Penna., together with a copy of this commitment.

RAYMOND J. MULLIGAN,
United States Marshal.

By ----------,
Deputy.

Filed Jan. 21, 1935.

Bench warrant

To the Marshal of the United States,
For the Southern District of New York,
And to his Deputies, or any or either of them.

Whereas at a District Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the Borough of Manhattan, in the City of New York, within and for the District and Circuit aforesaid, on the 31st of July, in the year of our Lord one thousand nine hundred and thirty-three, the District Attorney in and for the said District and Circuit, filed an Information against Joseph Weiner et al., for
27 having, in the Southern District of New York, violated a Criminal Contempt (Sherman Anti-Trust Act), injunction in case of United States of America vs. The Greater New York Live Poultry Chamber of Commerce et al. (Equity No. 52–30), as by said Information, now remaining on file and of record in the said Court, may more fully appear, to which Information the said Joseph Weiner has pleaded not guilty and having had a trial on February 21, 1934, and the said trial concluded on March 29, 1934, and the said Joseph Weiner having been found "guilty" on a verdict by the Court, was sentenced on March 29, 1934, to be imprisoned for a term of 6 months on Paragraph 4, 2 years on Paragraph 5, and 2 years on Paragraph 6. Sentence on Paragraph 4 to be executed at Detention Headquarters, N. Y. C.; Sentences on Paragraphs 5 and 6 to run concurrently with sentence on Paragraph 4; Sentence in this case is to begin when defendant completes sentence he is now executing on a State charge on Welfare Island; Sentence in this case is to be executed at a place to be designated by the Attorney General of the U. S.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America to apprehend the said Joseph Weiner

(On backing)

and him bring before the said Court, at the U. S. Court and Post Office Building, in the City of New York, to answer the Information aforesaid.

Witness, the Hon. John C. Knox, Judge of the District
28 Court of the United States, for the Southern District of New York, at The Borough of Manhattan, in the City of New York, the 30th day of March, in the year of our Lord one thousand nine hundred and thirty-four.

CHARLES WEISER, *Clerk.*

[SEAL] MARTIN CONBOY, *U. S. Attorney.*

Defendant released on $5,000 bail. Nov. 23, 1934.

CHARLES WEISER.

C95-434

United States District Court, Southern District of New York

THE UNITED STATES OF AMERICA

vs.

JOSEPH WEINER

Bench warrant

Martin Conboy, U. S. Attorney

I hereby depute Berman & (illegible) to execute the within process. Dated New York, 11-22-34.

R. J. MULLIGAN,
U. S. Marshall.

Filed Dec. 13, 1934, U. S. District Court, S. D. of N. Y.
29 Received this warrant 30th day of March 1934, at New York City and executed the same by arresting the within named Joseph Weiner, at New York City, on the 23rd day of Nov. 1934, and have his body now in court, as within I am commanded.

R. J. MULLIGAN,
U. S. Marshal, S. D. N. Y.

District Court of the United States Southern District of New York

Criminal No. C95-434

UNITED STATES OF AMERICA, COMPLAINANT AND PETITIONER

v.

JOSEPH WEINER ET AL., DEFENDANT

Motion for rule to show cause

Now comes the United States of America, complainant, by George Z. Medalie, its attorney for the Southern District of New York,

and by Harold M. Stephens, Assistant Attorney General, and Walter L. Rice, Special Assistant to the Attorney General, and moves this court for a rule upon Joseph Weiner, Arthur Herbert (alias "Tootsie" Herbert), Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler (alias "Arke"), Harry Frankel, Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Local 440 of the Poultry
30 Slaughterers Shochtim Union of Greater New York, and Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., defendants, commanding and requiring them and each of them, on or before a day to be fixed in said rule, to show cause, if any there be, why they and each of them should not be adjudged to be in contempt of this court for having violated the injunction ordered and issued by this court on February 6, 1932, in Equity Cause No. 52–30, entitled "United States of America v. The Greater New York Live Poultry Chamber of Commerce et al.", then pending in this court, and be attached and punished for the same, as prayed in the information and petition filed in this proceeding.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York.
HAROLD M. STEPHENS,
Assistant Attorney General.
WALTER L. RICE,
Special Assistant to the Attorney General.

JULY 31, 1933.

31 In the District Court of the United States for the Southern District of New York

Criminal No. 95–434

UNITED STATES OF AMERICA, COMPLAINANT AND PETITIONER

v.

JOSEPH WEINER ET AL., DEFENDANTS

Rule to show cause

Upon motion of the United States of America, complainant, and good cause being shown by information filed by the United States Attorney for the Southern District of New York and by Harold M. Stephens, Assistant Attorney General, and Walter L. Rice, Special Assistant to the Attorney General, it is ordered that defendants, Joseph Weiner, Arthur Herbert (alias "Tootsie" Herbert), Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler (alias "Arke"), Tarry Frankel, Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Local 440 of the Poultry Shochtim Union of Greater New York, and Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., and each of them appear before this court in person,

in the criminal calendar room on the third floor of the Old Post Office Building at Broadway and Park Row, New York City, on August 21st, 1933, at 10:30 A. M., to show cause, if any there be,
32 why they and each of them should not be adjudged to be in contempt of the former order of this court for having violated the provisions of the injunction heretofore ordered and issued by this court on February 6, 1932, in Equity Case No. 52–30, entitled "United States of America v. The Greater New York Live Poultry Chamber of Commerce et al.", then pending in this court, and be attached and punished for the same; and that a copy of this rule and of the information and petition filed herein be served upon each of the defendants or their respective counsel on or before August 8th, 1933.

ROBERT P. PATTERSON,
United States District Judge.

AUGUST 7, 1933.

33 District Court of the United States, Southern District of New York

Criminal No. C95–434

UNITED STATES OF AMERICA, COMPLAINANT AND PETITIONER, *v.* JOSEPH WEINER ET AL., DEFENDANTS

Information charging criminal contempt, and petition for rule to show cause

To the Honorable Alfred C. Coxe, United States District Judge for the Southern District of New York:

The United States of America, by George Z. Medalie, its attorney for the Southern District of New York, and by Harold M. Stephens, Assistant Attorney General, and Walter L. Rice, Special Assistant to the Attorney General, acting under the direction of Homer S. Cummings, the Attorney General, presents this Information and Petition for Rule and Attachments against Joseph Weiner, Arthur Herbert (alias "Tootsie" Herbert), Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler (alias "Arke"), Harry Frankel, Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Local 440 of the Poultry Shochtim Union of Greater New York, and Local 440 of the Official Orthodox Poultry Slaughterers of America,
34 Inc., their respective successors, agents, and representatives, all of said defendants being located in New York City.

Petitioner now here informs the Court:

I

That on February 7, 1930, the United States of America filed a petition in the United States District Court for the Southern District of New York, in a proceeding entitled "United States of America v. The Greater New York Live Poultry Chamber of Com-

merce, et al." (Equity No. 52–30), against 103 defendants, including the defendants hereinabove designated, which petition was superseded on April 16, 1930, by an amended petition, charging that the defendants therein were engaged in a combination and conspiracy to restrain and monopolize, that they were attempting to monopolize, and that they had monopolized interstate trade and commerce in live and freshly slaughtered poultry in violation of the Act of Congress of July 2, 1890, entitled "An Act To regulate trade and commerce against unlawful restraints and monopolies" (26 Stat. 209), commonly known as the Sherman Anti-Trust Act, by the means and methods set forth in said amended petition. Said petition and amended petition are a part of the records of this court and are prayed to be taken and considered a part hereof.

II

That thereafter, to-wit, on November 16, 1931, the said cause came on for trial before the Honorable Francis G. Caffey, United States District Judge; that on December 18, 1931, after a trial ex-
35 tending over a period of five weeks, the said Judge Caffey rendered an opinion holding that defendants, Joseph Weiner, Arthur Herbert (alias "Tootsie" Herbert), Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler (alias "Arke"), Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America (hereinafter called Local 167), and Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., and other defendants, had committed the offenses charged in said amended petition, and that an injunction, effective and sweeping in its terms, should issue against said defendants and others;

That on February 6, 1932, this court entered a final decree against said defendants, their officers, agents, servants, employes, and all persons acting under, through, by, or in behalf of them or any of them, or claiming so to act, enjoining them and each of them from committing the acts therein specified. Said decree is a part of the records of this court, and a copy of said decree is annexed hereto and made a part hereof.

That Harry Frankel is and for many months heretofore has been an official delegate and business representative of Local 167, and as such represents Local 167, its members, officers, and employes; and that said Harry Frankel is enjoined as an officer, agent, servant, employe, and/or person acting under, through, by, and/or in behalf of Local 167, its officers, and employes.

That Local 440 of the Poultry Shochtim Union of Greater
36 New York is a new designation for Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., enjoined by said final decree, and is the same organization, representing the same members, and performing the same functions; that Local 440 of the Poultry Shochtim Union of Greater New York is affiliated with the American Federation of Labor in the same manner and as the same

union local as was Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc.; that to any extent that Local 440 of the Poultry Shochtim Union of Greater New York might be considered a separate or distinct entity or organization, it is a successor, agent, and acts under, through, by, and/or in behalf of Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., its officers, agents, members, and employes, and as such is enjoined by said final decree.

That printed copies of said decree were duly mailed to each of the defendants and to their respective counsel at their respective addresses; and that each of the defendants herein at and prior to the times that he committed the contempts set forth below was fully advised with respect to all of the provisions of said decree, and then knew, or had good reason to believe, that his acts and statements were in violation of the provisions thereof.

That all of the provisions of said decree are lawful orders, and lawfully made.

III

That the several defendants named herein have jointly and severally, willfully and knowingly disobeyed and violated the
37 injunctive provisions contained in said decree, by the means, in the manner, and for the purposes now set forth:

Said decree enjoins the defendants, their officers, agents, servants, employes, and all persons acting under any of them

"8. (b) from attempting to create, or creating in the poultry industry of the Metropolitan Area or in the minds of any persons engaged therein, a feeling of fear and terror for the purpose of preventing said persons from buying, selling, or distributing live poultry in a free, open, and competitive market;

"(c) from detaining, destroying, or damaging vehicles, or other equipment used in conveying live poultry within, into, or through the State of New York, to or from marketmen, retail dealers, butchers, or receivers;

"(d) from refusing, or instigating refusals, to load, unload, convey, deliver, slaughter, or handle poultry for any receiver, marketman, retail dealer, or butcher, wherever the rendition of such service under reasonable conditions shall be requested and the one requesting the service shall pay, or offer and be ready, able, and willing to pay or cause to be paid therefor the fair and reasonable value thereof;

* * * * * * *

"(g) from causing or coercing any marketman to employ laborers in excess of his reasonable requirements, whether such coercion is effected under the guise of labor union regulations or otherwise;

38 "(h) from following or spying upon marketmen, retail dealers, or butchers, or their representatives, employes, or truck drivers for the purpose of ascertaining the source of their poultry supplies, or intimidating them;

* * * * * * *

"(k) from restraining the freedom of any marketman, receiver, retail dealer, or butcher in any way in purchasing, loading, unloading, trucking, conveying, delivering, slaughtering, selling, or competing in the purchase and/or sale of poultry;

"(l) from using any of the offices or positions in Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, & Helpers of America, or in the Official Orthodox Poultry Slaughterers of America, Inc., or in similar organizations, for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular sellers thereof."

Defendants herein have jointly and severally violated each and every order of this court contained in the above-quoted provisions, 8–b, c, d, g, h, k, and l of said decree.

Said violations are now described in further detail, that is to say:

1. Each of the defendants named herein, on numerous occasions during the period from February 7, 1932, up to the time of filing the Information and Petition herein, has refused, and has instigated refusals, to load, unload, convey, deliver, slaughter, and handle
39 poultry for receivers, marketmen, and retail dealers, at West Washington Market, in the City of New York, at many of the wholesale and retail poultry markets in Greater New York, at the offices of Local 167, and at other places in the City of New York, such instances being too numerous to set forth individually. Said defendants have thereby violated paragraph 8–d of said decree. On such occasions said defendants have restrained the freedom of marketmen, receivers, retail dealers, and butchers in purchasing, unloading, trucking, conveying, delivering, slaughtering, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree. On many of such occasions said defendants have detained vehicles and other equipment used in conveying live poultry within the City of New York to and from marketmen, retail dealers, butchers, and receivers in violation of paragraph 8–c of said decree, and have attempted to create and have created a feeling of fear and terror in the minds of persons engaged in the poultry industry for the purpose of preventing said persons from buying, selling, and distributing poultry in a free, open, and competitive market in violation of paragraph 8–b of said decree.

2. On numerous occasions and continuously from the time of the entry of said decree, up to the time of the filing of this Information and Petition, said occasions being too numerous to be mentioned, defendants, Joseph Weiner, Arthur Herbert, Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler, Harry Frankel, Local 167 of the International Brotherhood of Team-
40 sters, Chauffeurs, Stablemen & Helpers of America, Inc., Local 440 of the Poultry Shochtim Union of Greater New York, and Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., their respective successors, agents, and representatives, threatened to cause and did cause, coerce, and compel many poultry mar-

ketmen to employ laborers in excess of their reasonable requirements, in violation of paragraph 8–g of said decree.

3. On numerous occasions and continuously from the time of filing of said decree to the time of filing the Information herein, defendants, Joseph Weiner, Arthur Herbert, Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler, and Harry Frankel, used their respective offices and positions in Local 167 and in Local 440 of the Poultry Shochtim Union of Greater New York for the purpose of coercing marketmen to buy poultry, poultry feed, and poultry coops from particular sellers thereof, in violation of paragraph 8–l of said decree. Said occasions are too numerous to set forth individually.

4. Defendants, Joseph Weiner, Arthur Herbert, Charles Herbert, and Sidney Rosenstein, are part-owners of, and/or receive payments from the Metropolitan Poultry Feed Corporation, which now is and continuously since the entry of said decree has been, engaged in selling poultry feed to receiver, marketmen, and poultry dealers in Greater New York at excessive prices. During all of said period of time, Arthur Herbert has been an official delegate and business delegate of Local 167, Charles Herbert and Joseph Weiner have been
41 official delegates and business representatives of Local 440 of the Poultry Shochtim Union of Greater New York, and Sidney Rosenstein has been a member of Local 167: all of said defendants have used their offices and positions in said labor unions for the purpose of coercing marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8–l of said decree, such instances being too numerous to mention; all of said defendants have threatened to cause and have caused and coerced marketmen to employ laborers in excess of their reasonable requirements, for the purpose, among others, of compelling said marketmen to buy their poultry feed exclusively from the Metropoliton Poultry Feed Corporation, in violation of paragraph 8–g of said decree, such instances being too numerous to mention; and said defendants have spied upon marketmen for the purpose of ascertaining the source of their poultry feed, in violation of paragraph 8–h of said decree, such instances being too numerous to mention.

5. On or about December 21, 1932, defendant Joseph Weiner, accompanied by Jacob Roth, Harry Dratt, Hyman Dratt, and other individuals, to the United States attorney unknown, visited the S. S. & B. Market at 1314 Cooper Avenue, Bronx, New York, and there ordered Samuel Weiner, a poultry marketman and one of the proprietors of the said S. S. & B. Market, to rent and/or buy coops exclusively from the New Jersey Coop Company, and to cease renting and/or buying poultry coops from other sources. Defendant Joseph Weiner threatened to injure said Samuel Weiner and
42 the property of S. S. & B. Market in the event that Samuel Weiner and his business associates did not comply with said demands. Defendant Joseph Weiner thereafter, to-wit, on or about April 6, 1933, caused the S. S. & B. Market to be wrecked and

damaged and thereby cause the proprietors and employes of the S. S. & B. Market and all other persons in the poultry industry in Greater New York to be terrified and put in fear. Defendant Joseph Weiner thereby attempted to create and did create in the minds of Samuel Weiner and his business associates in the S. S. & B. Market a feeling of fear and terror for the purpose of preventing Samuel Weiner and all other persons engaged in the wholesale poultry business in Greater New York from buying, selling, or distributing live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree.

6. During the period from December 1932 to and including April 1933 defendant Joseph Weiner used his position and office as an official delegate and business representative of Local 440 of the Official Orthodox Slaughterers of America, Inc., for the purpose of coercing Samuel Weiner and other marketmen to buy their poultry and other commodities necessary to the poultry business from particular sellers, in the manner described in paragraph 6 hereinabove, in violation of paragraph 8–l of said decree. During or about the month of November 1932 defendant Joseph Weiner caused, coerced, and compelled the S. S. & B. Market to employ laborers in excess of their reasonable requirements, upon discovering that the said S. S. & B. Market was obtaining poultry coops which are used in transporting
43 poultry to the wholesale markets from sources other than the New Jersey Coop Company; and said Joseph Weiner thereby violated paragraph 8–g and paragraph 8–l of said decree.

7. During or about November 1932 defendants Harry Schomer and Arthur Herbert caused, coerced, and compelled said Samuel Weiner and the S. S. & B. Market to employ laborers in excess of their reasonable requirements.

8. Defendants, Charles Herbert, Harry Schomer, Arthur Herbert, and Joseph Weiner, on many occasions from September 1932 up to and including April 30, 1933, visited Santi Brothers poultry market at 1373 Sixty-first Street, New York City, and there threatened to injure Joseph Shlapin, a part-time shochet employed by Santi Brothers, and to injure and prevent James Santi and Michael Santi, poultry marketmen and proprietors of Santi Brothers market, from loading, conveying, slaughtering, delivering, and selling poultry, unless said Santi Brothers discharged said Joseph Shlapin. In pursuance of said threats, Harry Schomer and Charles Herbert compelled said Joseph Shlapin to leave Santi Brothers market on or about April 13, 1933, and later on the same day threatened to kill Joseph Shlapin for having failed to heed said prior threats. Defendants, Charles Herbert, Harry Schomer, Arthur Herbert, Max Keslin, and Harry Frankel, on several occasions from September 1932 to April 30, 1933, prevented Santi Brothers from loading poultry at West Washington Market, and during or about April
44 1933 compelled Santi Brothers to discharge said Joseph Shlapin and employ a full-time shochet holding membership in Local 440 of the Poultry Schochtim Union of Great New York.

In the manner and by the means described above and by other means, said defendants attempted to create and did create in the minds of James Santi, Michael Santi, Joseph Shlapin, and all other persons in the poultry industry a feeling of fear and terror for the purpose of preventing said persons and others from buying, selling, and distributing live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree; and restrained the freedom of James Santi, Michael Santi, and other marketmen and receivers in purchasing, loading, unloading, trucking, conveying, delivering, slaughtering, selling, and competing in the *the* purchase and sale of poultry, in violation of paragraph 8–k of said decree; and refused and instigated refusals to load, convey, slaughter, deliver, sell, and handle poultry, in violation of paragraph 8–d of said decree; and caused and coerced said marketmen to employ laborers in excess of their reasonable requirements, in violation of paragraph 8–g of said decree.

9. During or about February or March 1933 defendants, Sidney Rosenstein, Aaron Weissler, and/or other persons, representing defendants, Arthur Herbert, Charles Herbert, Joseph Weiner, Aaron Weissler, and Sidney Rosenstein, refused to load poultry for Dan Lopelato, a marketman operating a poultry market at 1465 Roberts Avenue, Bronx, New York, because said Dan Lopelato had purchased feed from a source other than the Metropolitan Poultry Feed Corporation, and threatened to prevent said Dan Lopelato from buying or loading poultry in the City of New York unless he purchased his poultry feed exclusively from the Metropolitan Poultry Feed Corporation, and thereby attempted to create and created in the minds of Dan Lopelato and the other persons engaged in the poultry industry, a feeling of fear and terror for the purpose of preventing said persons from buying, selling, or delivering live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree; and instigated refusals to load, convey, deliver, and handle poultry for said Dan Lopelato in violation of paragraph 8–d of said decree; and spied upon said Dan Lopelato for the purpose of ascertaining the source of his poultry feed and intimidating him, in violation of paragraph 8–h of said decree and restrained the freedom of said Dan Lopelato in purchasing, loading, trucking, conveying, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree; and used their offices and positions in Local 167 and in Local 440 of the Poultry Shochtim Union of Greater New York for the purpose of coercing said Dan Lopelato to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8–l of said decree.

10. During or about May 1933 defendants, Harry Schomer, Harry Frankel, Arthur Herbert, Aaron Weissler, and others, threatened to cause and did cause and coerce David Litvack, Jack Litvack, William Litvack, and Murray Litvack, marketmen and proprietors of the Kings Poultry Market of New York City, to employ laborers

46 in excess of their reasonable requirements, in violation of paragraph 8–g of said decree; and refused and instigated refusals to load, unload, convey, deliver, slaughter, and handle poultry for the said Kings Poultry Market, in violation of paragraph 8–b of said decree; and detained and damaged trucks of the said Kings Poultry Market, in violation of paragraph 8–c of said decree; and attempted to create and did create in the minds of said marketmen and others a feeling of fear and terror for the purpose of preventing them from buying, selling, and distributing live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree; and restrained the freedom of said marketmen in purchasing, loading, unloading, trucking, delivering, slaughtering, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree.

11. During or about January 1933 defendants, Harry Schomer, Harry Frankel, and Arthur Herbert, prevented Joseph Schechter, Martin Schechter, Alex Schechter, and Aaron Schechter, marketmen and proprietors of Schechter Brothers markets at 858 East 52nd Street, and at 991 Rockaway Avenue, in the city of New York, from purchasing, taking delivery of, using, and transporting poultry coops manufactured by the Reliable Box & Lumber Company, of Newark, New Jersey, and coerced and compelled the said Schechter Brothers market to buy, rent, and use exclusively the poultry coops of the New Jersey Coop Company; said defendants retained said coops manufactured by the Reliable Box & Lumber Company, in violation of paragraph 8–c of said decree, spied upon the said

47 Schechter Brothers for the purpose of ascertaining the source of their coops and intimidating them, in violation of paragraph 8–h of said decree; restrained the freedom of said Schechter Brothers in loading, unloading, trucking, conveying, delivering, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree; and used their respective offices and positions in Local 167 and in Local 440 of the Poultry Shochtim Union of Greater New York for the purpose of coercing the said Schechter Brothers market to buy coops from the New Jersey Coop Company, in violation of paragraph 8–l of said decree.

12. On or about December 29, 1932, defendants, Max Keslin, Arthur Herbert, Harry Schomer, Harry Frankel, and Local 167 detained a poultry truck owned by Ike Kaplin, a poultry marketman, and one of the owners of the Prospect Live Poultry Market, 1737 Prospect Place, New York City, upon its arrival in West Washington Market to obtain a delivery of poultry, in violation of paragraph 8–c of said decree; and refused and instigated refusals to load, convey, deliver, and handle poultry for said Ike Kaplan, in violation of paragraph 8–d of said decree; and restrained the freedom of said Ike Kaplan in purchasing, loading, trucking, conveying, delivering, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree; and caused and coerced said Ike Kaplan

to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree; and defendant Max Keslin
48 called said Ike Kaplan insulting names in a threatening and offensive manner, and violently struck and injured him, and thereby attempted to create, and did create, in the mind of said Ike Kaplan and other poultry marketmen a feeling of fear and terror for the purpose of preventing him from buying, selling, and distributing live poultry in a free, open, and competitive market in violation of paragraph 8–b of said decree.

13. On numerous occasions during the period from February 7, 1932, up to April 1933, defendants, Max Keslin, Arthur Herbert, Harry Schomer, Harry Frankel, Charles Herbert, Local 167, and Local 440 of the Poultry Schochtim Union of Greater New York threatened to refuse, and did refuse and instigate refusals, to load, unload, convey, deliver, slaughter, and handle poultry for Charles Bestritsky and Ike Kaplan, marketmen and proprietors of the Prospect Poultry Market, 1737 Prospect Place, New York City, in violation of paragraph 8–d of said decree; restrained the freedom of said Charles Bestritsky and Ike Kaplan in purchasing, loading, unloading, trucking, conveying, deliveries, slaughtering, selling, and competing in the purchase and sale of poultry in violation of paragraph 8–k of said decree; caused and coerced said Charles Bestritsky and Ike Kaplan to employ laborers in excess of their reasonable requirements in violation of paragraph 8–g of said decree; and attempted to create, and did create, a feeling of fear and terror in their minds for the purpose of preventing them from buying, selling, and distributing live poultry in a free, open, and competitive market in violation of paragraph 8–b of said decree.

49 14. During or about September 1932 and January 1933 defendants, Arthur Herbert, Charles Herbert, Harry Schomer, Harry Frankel, Max Keslin, and other persons acting on their behalf and on behalf of Local 167 and Local 440 of the Poultry Shochtime Union of Greater New York, threatened to cause and did cause and compel Louis Mirotznick, a marketman and one of the proprietors of the Mirotznick & Rosenberg poultry market, at 873 Liberty Avenue, Brooklyn, New York, to employ laborers in excess of his reasonable requirements in violation of paragraph 8–g of said decree; refused and instigated refusals to load, unload, convey, deliver, slaughter, and handle poultry for said Louis Mirotznick at West Washington Market and other places in Greater New York, in violation of paragraph 8–d of said decree; restrained the freedom of said Louis Mirotznick in purchasing, loading, unloading, trucking, conveying, delivering, slaughtering, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree; and threw stench bombs into the said Mirotznick & Rosenberg poultry market and threw stones at their trucks and threatened to injure and kill Victor Schiffer, a shochet employed in the said Mirotznick & Rosenberg poultry market and followed and spied

upon said shochet, and thereby attempted to create and did create in the minds of Louis Mirotznick and all other poultry marketmen in New York City a feeling of fear and terror for the purpose of preventing said marketmen from buying, selling, and distributing live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree.

50 15. During or about August 1932 and during or about December 26, 1932, and during or about January 1933, defendants Aaron Weissler, Harry Frankel, Harry Schomer, Max Keslin, Arthur Herbert, and Charles Herbert, refused, and instigated refusals at West Washington Market and at other places in Greater New York, to load, convey, deliver, and handle poultry for Benjamin Hasenfratz, a marketman and one of the proprietors of a poultry market at 718 New Lots Road, Brooklyn, New York, in violation of paragraph 8–d of said decree; and detained said Benjamin Hasenfratz's poultry truck, in violation of paragraph 8–c of said decree; and restrained the freedom of said Benjamin Hasenfratz in purchasing, loading, trucking, conveying, delivering, selling, and competing in the purchase and sale of poultry, in violation of paragraph 8–k of said decree; and threatened to injure said Benjamin Hasenfratz, thereby attempting to create and creating in the mind of said Benjamin Hasenfratz and all other persons engaging in the poultry industry in New York City a feeling of fear and terror for the purpose of preventing them from buying, selling, and distributing poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree; and threatened and caused and did cause and coerce said Benjamin Hasenfratz to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree.

16. During or about December 1932 defendants, Max Keslin, Arthur Herbert, and Harry Schomer, ordered and caused the members of Local 167, employed as loaders by the Chelsea Live

51 Poultry Company at West Washington Market, and other places in Greater New York, not to load poultry for Isidore Farbman, a marketman and one of the proprietors of the Prospect Live Poultry Market, of New York City, in violation of paragraph 8–d of said decree; and detained said Isidore Farbman's truck, in violation of paragraph 8–c of said decree; and restrained the freedom of said Isidore Farbman in purchasing and selling poultry, in violation of paragraph 8–d of said decree.

17. During or about September 1932, defendants, Max Keslin, Harry Schomer, Arthur Herbert and Harry Frankel, refused and instigated refusals to load poultry, in West Washington Market, and other places in Greater New York, for Frank Plotkin, a marketman and one of the proprietors of the Plotkin & Zimmering poultry market, 510 East 20th Street, New York, in violation of paragraph 8-d of said decree; and detained said Frank Plotkin's truck, in violation of paragraph 8-c of said decree; and restrained the freedom of said Frank Plotkin in purchasing and selling poultry, in violation of paragraph 8-k of said decree; and attempted to create and did create

in the mind of said Frank Plotkin a feeling of fear and terror for the purpose of preventing him from buying, selling, and distributing live poultry in a free, open, and competitive market, in violation of paragraph 8-b of said decree.

18. During or about February or March 1933, defendants Arthur Herbert and Harry Schomer caused and coerced Hyman Haber, a marketman situated at 611 East 189th Street, New York City,
52 to employ laborers in excess of his reasonable requirements, in violation of paragraph 8-g of said decree.

19. During or about the latter part of February 1933, defendants, Harry Schomer, Harry Frankel, Arthur Herbert, and Max Keslin, caused and coerced Morris Rubin, a marketman situated at 1640 E. New York Avenue, New York City, to employ laborers in excess of his reasonable requirements, in violation of paragraph 8-g of said decree.

20. During the latter part of February 1933, or the early part of March 1933, defendants, Aaron Weissler, Max Keslin, Harry Schomer, Harry Frankel, Arthur Herbert, and Max Keslin, refused, and instigated refusals, to load, deliver, and handle poultry, in West Washington Market, and other places in Greater New York, for Morris Rubin, a poultry marketman, in violation of paragraph 8-d of said decree; and detained said Morris Rubin's truck, in violation of paragraph 8-c of said decree; and restrained the freedom of said Morris Rubin purchasing and selling poultry, in violation of paragraph 8-k of said decree; and attempted to create and did create in the mind of said Morris Rubin a feeling of fear and terror for the purpose of preventing him from buying, selling, or distributing live poultry in a free, open, and competitive market, in violation of paragraph 8-b of said decree.

21. During or about December 1932, defendants Sidney Rosenstein and Max Keslin threatened to cause union trouble and other trouble for Morris Rubin, a marketman, unless he purchased his poultry feed exclusively from Metropolitan Poultry Feed
53 Corporation; and said defendants thereby used their offices in Local 167 to coerce said Morris Rubin to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8-l of said decree.

22. During or about December 1932 and January 1933 defendants Charles Herbert and Arthur Herbert caused and coerced Abe Harrison, a poulty marketman situated at 2848 West 21st Street, Coney Island, New York, to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree; and threatened to refuse and did refuse and instigate refusals to load, convey, deliver, slaughter, and handle poultry for said Abe Harrison, in violation of paragraph 8–d of said decree.

23. During or about the fall of 1932 defendants, Arthur Herbert, Charles Herbert, Harry Schomer, Harry Frankel, Max Keslin, and Aaron Weissler, refused and instigated refusals to load, convey, deliver, slaughter, and handle poultry for Sam Feldman, a marketman

situated in Williamsburg, New York, in violation of paragraph 8–d of said decree.

24. During the winter of 1932–1933 defendants, Arthur Herbert, Harry Schomer, and Harry Frankel, caused and coerced Benny Rutskin, a poultry marketman and one of the partners of the Kassah Live Poultry Company, 1855 Pacific Street, Brooklyn, New York, to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree.

54 25. During the fall of 1932 defendants, Harry Schomer, Arthur Herbert, Harry Frankel, and Max Keslin, refused and instigated refusals to load, convey, deliver, and handle poultry at West Washington Market and other places in Greater New York for Harry Gabin, a poultry marketman of New York City, in violation of paragraph 8–d of said decree, and detained said Harry Gabin's poultry truck, in violation of paragraph 8–c of said decree; and restrained the freedom of said Harry Gabin in purchasing and selling poultry, in violation of paragraph 8–k of said decree; and attempted to create and did create in the mind of said Harry Gabin a feeling of fear and terror for the purpose of preventing him from buying, selling, or distributing live poultry in a free, open, and competitive market, in violation of paragraph 8–b of said decree.

26. On or about June 1932 defendants Arthur Herbert and Harry Schomer caused and coerced Hyman Nierenberg, a marketman situated at 87 Tompkins Street, New York, to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree.

27. During or about March or April 1932 defendants, Max Keslin, Arthur Herbert, Aaron Weissler, Harry Frankel, and Harry Schomer, caused and coerced Philip Podberesky, a poultry marketman in New York City, to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree.

28. During or about March of April 1933 defendant Harry Schomer threatened to cause and did cause and coerce Joseph Scull, a
55 poultry marketman situated in Coney Island, New York, to employ laborers in excess of his reasonable requirements, in violation of paragraph 8–g of said decree.

29. During or about November 1932, defendants Charles Herbert and Harry Schomer caused and compelled Isidore Robbins and Joseph Poster, poultry marketmen and partners in Poster & Robbins, Inc., 31 N. Haven Railroad Street, Mt. Vernon, New York to employ laborers in excess of their reasonable requirements, in violation of paragraph 8–g of said decree; and defendants Harry Schomer and Charles Herbert refused, and instigated refusals to load poultry for said Isidore Robbins and Joseph Poster at West Washington Market and other places in Greater New York, in violation of paragraph 8–d of said decree; and detained their poultry truck, in violation of paragraph 8–c of said decree; and restrained the freedom of said Isidore Robbins in purchasing and selling poultry, in violation of paragraph 8–k of said decree; and attempted to

create and did create in the mind of said Isidore Robbins a feeling of fear and terror for the purpose of preventing him from buying, selling or distributing live poultry, in a free, open, and competitive market, in violation of paragraph 8–b of said decree.

30. Defendants Joseph Weiner, Arthur Herbert, Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler, Harry Frankel, Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local 440 of the Poultry Shochtim Union of Greater New York, and Local
56 440 of the Official Orthodox Poultry Slaughterers of America, Inc., their respective successors, agents, and representatives, all of said defendants being located in New York City, combined and conspired to do each of the acts and commit each of the violations alleged in this Information and Petition, and other acts, and each of said defendants committed the several violations alleged in this Information and Petition on behalf of each of the other defendants, and all of said defendants thereby violated the several provisions of said decree in the manner alleged in this Information and Petition.

Wherefore your informant and petitioner charges that the defendants named herein, severally and jointly, have wilfully, wrongfully, and knowingly disobeyed and violated the provisions of said final decree entered by this Court on February 6, 1932, in Equity Cause No. 52–30, in the manner, by the means, and for the purposes charged herein; and prays that an order be issued from this Court upon this Information and Petition and the annexed affidavit, directing and requiring said defendants, and each of them, to appear before this Court at a time to be fixed in said order, to show cause, if any there be, why they should not be attached and punished for contempts of this Court, and that upon the hearing of these charges such punishment be imposed upon said defendants as may seem to the Court right and proper.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York.

57 HAROLD M. STEPHENS,
Assistant Attorney General.

WALTER L. RICE,
Special Assistant to the Attorney General.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

WALTER L. RICE, being duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States in the Department of Justice;

That by direction of his superior officers in the Department of Justice, he has caused a careful investigation to be made by Special Agents of the United States Bureau of Investigation into alleged violations of the final decree of the United States District Court

for the Southern District of New York, entered February 6, 1932, in Equity Cause No. 52–30; that under directions of the Attorney General of the United States he has presented evidence to a grand jury in the Southern District of New York concerning alleged violations of said decree;

That the foregoing Information and Petition is based upon and drafted from the information set forth in the reports made by special agents, the testimony before said grand jury, and statements made in his presence by persons engaged in the live poultry trade of Greater New York;

58 That he has prepared and read the foregoing Information and Petition, and that from the knowledge he has thus acquired of the matters charged therein, he believes the allegations and statements contained in said Information and Petition are true.

WALTER L. RICE.

Sworn to before me and subscribed in my presence this 31st day of July, 1933.

DAVID MARCUS,
Notary Public, Kings Co.

Kings Co. Clerk's No. 480, Reg. No. 5095. N. Y. Co. Clk's No. 191, Reg. No. 5M117.

Commission expires March 30, 1935.

Memorandum of Proceedings Had in Criminal Case No. C95–434

U. S. *vs.* JOSEPH WEINER ET AL., C 95–434 (Cont'd)

Feb. 20, 1934—Raymond J. Riley trial counsel for Harry Schomer. Decision reserved as to forfeiture of bail of defts. Schomer and Grankel. Adjd until Feb. 21, 1934.

Feb. 21, 1934—Defts. waive jury trial. Trial begun without the presence of a jury as to J. Weiner, A. Herbert, C. Herbert, S. Rosenstein, H. Frankel, Max Keslin and Aaron Weissler, and the three unions. Caffey, D. J.

59 Feb. 22, 1934.—Trial cont'd.

Feb. 23, 1934.—Trial cont'd.

Feb. 26, 1934.—Trial cont'd.

Feb. 27, 1934.—Trial cont'd.

Feb. 28, 1934.—Trial cont'd.

Mar. 1, 1934.—Trial cont'd.

Mar. 2, 1934.—Trial cont'd.

Mar. 5, 1934.—Trial cont'd.

Mar. 6, 1934.—Trial cont'd.

Mar. 7, 1934.—Trial cont'd.

Mar. 8, 1934.—Trial cont'd.

Mar. 9, 1934.—Trial cont'd.

Mar. 12, 1934.—Trial cont'd.

Mar. 13, 1934.—Trial cont'd.

Mar. 15, 1934.—Trial cont'd. Govt. rests.

Mr. Kaufman moves to dismiss the information. Denied Exc.

Mr. Kaufman moves to dismiss certain paragraphs in the information—Sustained as to paragraphs 23, 24, and 26. Denied as to all other motions Exc.

Mr. Perlman and Mr. Riley makes like motions. Denied Exc.

Mar. 16, 1934.—Mr. Kaufman, Atty. for defts., ill.

Mar. 19, 1934.—Trial cont'd. S. Rosenstein ill. Counsel stipulate to continue without presence of deft. Rosenstein.

Mar. 20, 1934.—Trial cont'd.

Mar. 21, 1934.—Trial cont'd.

Mar. 22, 1934.—Trial cont'd.

Mar. 23, 1934.—Trial cont'd.

Mar. 26, 1934.—Trial cont'd.

Mar. 27, 1934.—Trial cont'd. Defts. rest. Govt. rests.

60 Mar. 28, 1934.—Mr. Kaufman moves to dismiss the information against all of the defendants on the grounds stated at the close of the government's case, also moves for an acquittal of the defendants on the ground that the government has totally failed to establish the allegations of the information. Denied Exc.

Mr. Kaufman argues to court.

Mr. Perlman argues to court.

Mr. Rice argues to court.

Mar. 29, 1934.—Mr. Rice argues to court.

Motion to forfeit bail of Harry Schomer, Denied.

Verdict:

Joseph Weiner—Guilty of paragraphs 4, 5, and 6.

Arthur Herbert—Guilty of paragraph 4.

Sidney Rosenstein—Guilty of paragraph 4.

Harry Frankel—Guilty of paragraph 11.

Max Keslin—Guilty of paragraphs 12, 13, 16, and 17.

Above named defts. acquitted on all other paragraphs.

Aaron Weissler, Charles Herbert, and the three unions acquitted.

Sentences:

Joseph Weiner—On paragraph 4—Six Months at Detention Hdqtrs, N. Y. C. On paragraphs 5 and 6—Two Years at place of confinement to be designated by the Atty. Gen'l. Sentences are to run concurrently and to commence upon release of deft. from N. Y. Penitentiary, Welfare Island, N. Y. Term of court
61 is extended until after the decision of the C. C. A. of New York.

Arthur Herbert, alias "Tootsie Herbert"—Sentenced to six months at Detention Headquarters N. Y. C. Execution of sentences stayed until April 2, 1934. Bail cont'd.

Sidney Rosenstein—Sentenced to six months at Detention Headquarters N. Y. C. Execution of sentence stayed until April 12, 1934. Bail cont'd.

Harry Frankel—Sentenced to three months at Detention Headquarters N. Y. C. Execution of sentence stayed until April 2, 1934. Bail cont'd.

Max Keslin—Sentenced to three months at Detention Headquarters N. Y. C. Execution of sentence stayed until April 2, 1934. Bail cont'd.

Committments issued as to above defendants. Gaffey, D. J.

June 4, 1934.—Francis G. Caffey, J.

Motion of deft., Weiner, for modification of sentence heard.

June 5, 1934.—Hearing of motion continued—Sentence modified to read:

"On Paragraphs 5 and 6—2 years in the Penitentiary, service to begin when sentence of State Court is ended—On Paragraph 4—1 yr. and a day in the Penitentiary, sentence on Paragraph 4 to run concurrently with sentence on Paragraphs 5 and 6—Term of Court extended for 30 days after opinion by C. C. A."

Consented to by Defendant and Counsel on both sides.

June 6, 1934.—Arthur Herbert, Max Keslin, Sidney Rosenstein,
62 Harry Frankel—Motion to have defendants substitute bail denied—Bails given in C. C. A.

Harry Schomer—Adjd. June 7, 1934.

Aug. 21, 1933.—Joseph Weiner pleads not guilty. Bail, $5,000.—Paroled to give bail.

Arthur Herbert pleads not guilty. Bail, $5,000.—Paroled to give bail.

Charles Herbert pleads not guilty. Bail, $5,000.—Paroled to give bail.

Max Keslin pleads not guilty. Bail, $3,500.—Paroled to give bail.

Harry Schomer pleads not guilty. Bail, $3,500.—Paroled to give bail.

Sidney Rosenstein pleads not guilty. Bail, $5,000.—Paroled to give bail.

Aaron Weissler pleads not guilty. Bail, $5,000.—Paroled to give bail.

Harry Frankel pleads not guilty. Bail, $2,500.—Paroled to give bail.

Local No. 167, International Brotherhood of Teamsters, Chauffeurs, etc., pleads not guilty by counsel.

Local No. 440 of the Poultry Schochtim Union of Greater N. Y. pleads not guilty by counsel.

Local No. 440 of the Official Orthodox Poultry Slaughterers of America, Inc., pleads not guilty by counsel.

Feb. 19, 1934.—Case called for trial. Harry Schomer not present. Testimony taken as to illness of Harry Schomer. Bench warrants ordered for the following witnesses: Samuel Weiner, Sam Shipper, Hyman Black, Abe Stanowitz, Sam Semberg. Adjd. until Feb. 20, 1934. Francis G. Caffey.

63 (Backing:) Form No. 680. Criminal No.—C95–434. In the District Court of the United States for the Southern Dist. of New York. United States of America, complainant and petitioner, *vs.* Joseph Weiner et al., defendants. Information in contempt and petition and affidavit for rule to show cause.

(Stamped:) U. S. District Court. Filed: Jul. 31, 1933. S. D. of N. Y.

In United States District Court

Writ of habeas corpus

The President of the United States of America

To Henry C. Hill, Warden of the United States Northeastern Penitentiary, or Any of his Assistants, Greeting:

We command you, that you have the body of Joseph Weiner, by you imprisoned and detained, as it is said, together with the
64 time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Honorable Albert W. Johnson, Judge, United States District Judge, Middle District of Pennsylvania, sitting in and for the Middle District of Pennsylvania, at the Courthouse, in the City of Lewisburg, state of Pennsylvania, on the 13th day of May, A. D., 1935, at 10:00 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning Joseph Weiner, and have you then and there this writ.

Witness, the Honorable Albert W. Johnson, Judge of the United States District Court, Middle District of Pennsylvania, the 7th day of May 1935.

S. W. HOFFORD,
Clerk of the United States District Court,
Middle District of Pennsylvania.
[SEAL] By H. F. KAUFMAN,
Dep. Clerk.

The foregoing Writ is hereby allowed this 7th day of May 1935.

ALBERT W. JOHNSON,
Judge, United States District Court,
Middle District of Pennsylvania.

Now to wit, May 8th, A. D. 1935, executed the within writ
65 of Habeas Corpus on Henry C. Hill, Warden, U. S. N. E. Penitentiary, by making service on H. J. Hendrick, Asst. Record Clerk, U. S. N. E. Penitentiary, by reading to and making known the contents thereof and leaving with the said H. J. Hendrick a copy of the within writ and petition. Service was made in the office of the Record Clerk at the U. S. N. E. Penitentiary, Lewisburg, Union County, and within the Middle District of Pennsylvania.

So Answers, Michael F. O'Malley, Acting United States Marshal.

Per: CLOYD E. WILSON, *Deputy.*

In United States District Court

Response

Now comes the respondent in the above entitled proceedings and in obedience to said writ produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a commitment and an amended commitment, namely:

"(a) A commitment issued out of the United States District Court for the Southern District of New York in No. 95–434 Criminal Docket, a certified photostatic copy of which is attached hereto, made a part of this response, and marked Exhibit 1; and

"(b) An amended commitment issued out of said United States District Court for the Southern District of New York in No.
66 95–434 Criminal Docket, a certified photostatic copy of which is attached hereto, made a part of this response, and marked Exhibit 2."

Further answering, the respondent says:

1. Respondent denies the allegations of the First paragraph of the petition that petitioner is unlawfully detained by him, and in answer thereto he avers that petitioner is legally and lawfully held for the service of his sentence under the aforementioned commitment and amended commitment.

2. Respondent admits the allegations contained in the Second and Third paragraphs of the petition relating to the injunction which was issued against petitioner and others, by the District Court for the Southern District of New York, in Equity Case No. E–52–30, entitled United States of America v. The Greater New York Live Poultry Chamber of Commerce, et al.

3. Respondent admits the allegations contained in the Third, Fourth, Fifth, and Sixth paragraphs of the petition, relating to the Information by which petitioner was charged with the violation of the terms of said Decree. Said Decree and said Information are set forth respectively as Exhibits (a) and (g), attached to the petition herein.

4. Respondent admits the allegations contained in the Seventh and Eighth paragraphs, relating to the conviction of petitioner of the contempts charged in paragraphs 4, 5, and 6 of the Information, the sentence and modified sentence imposed upon petitioner, and the commitment of petitioner.

5. Respondent denies the allegations contained in the Ninth
67 paragraph of the petition, that a penalty of six months is provided by statute for the punishment of acts of the character mentioned in the said Information, and denies that petitioner was entitled, on the date of the petition, or at present, to be released.

6. Respondent denies the allegation contained in the tenth paragraph of the petition that petitioner is entitled to be discharged

from further confinement under Section 22 of the Clayton Act therein set forth. Respondent asserts that, as hereinafter shown, the said Section 22 has no application to the petitioner, or to the offense for which he was convicted, and therefore in no way operates to limit the period during which he may lawfully be imprisoned.

7. Respondent admits the allegation contained in the eleventh paragraph of the petition that no fine was assessed against the petitioner, but denies the allegation of said paragraph that the sentence imposed upon petitioner exceeded the period which might lawfully be imposed by the District Court for the Southern District of New York, and denies the allegation of said paragraph that petitioner cannot be lawfully imprisoned further in obedience to the sentence imposed upon him by said court on June 5, 1934.

8. Respondent admits that the certified copies of the documents listed in the twelfth paragraph of the petition and attached thereto are true and correct copies of the documents which they purport to represent.

9. Further answering, respondent avers that, as shown by
68 the certified copy of the sentence imposed upon petitioner on March 29, 1934, attached hereto and marked Exhibit 1, petitioner was lawfully convicted of the offenses charged in paragraphs 4, 5, and 6 of the information, a copy of which is attached to the petition and designated Exhibit (g); that upon the petition of the present petitioner (as appears from a certified copy of an affidavit of Samuel Kaufman, which is attached hereto and marked Exhibit 5), the sentence therupon imposed was modified on June 5, 1934, by increasing the sentence upon paragraph 4 of the information from six months to one year and one day, in order that it might be served concurrently with the sentence of two years' imprisonment imposed on paragraphs 5 and 6; and that such modification was expressly assented to by petitioner, being fully advised of the nature and effect of such modification (as will appear from p. 109 of the verified copy of the transcript of the hearing on petitioner Joseph Weiner's application for modification of sentence, attached hereto and marked Exhibit 12).

10. Further answering, respondent avers that as a matter of law petitioner is at the present time serving lawful concurrent sentences of one year and one day on paragraph 4 of the information and two years on paragraph 5, and the same period on paragraph 6; that the term of no one of these sentences, even with the deduction of good time, has expired; and that therefore petitioner is not entitled to a writ of habeas corpus.

11. Further answering, respondent avers that the said Section 22 of the Clayton Act invoked by petitioner has no application
69 to this cause by reason of Section 24 of the same Act, which provides (28 U. S. C. A., sec. 389):

"Nothing contained in sections 386 to 388 and 390 of this title (Clayton Act, secs. 21, 22, 23, and 25) shall be construed to relate to con-

tempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, but the same and all other cases of contempt not specifically embraced within section 386 of this title may be punished in conformity to the usages at law and in equity prevailing on October 15, 1934."

12. Further answering, respondent avers that petitioner was sentenced as aforesaid upon conviction of criminal contempt for having disobeyed a lawful decree entered by the United States District Court for the Southern District of New York in the case entitled "United States of America, petitioner, v. The Greater New York Live Poultry Chamber of Commerce et al., defendants, which was an equity suit brought by and prosecuted in the name of and on behalf of the United States under the provisions of the Sherman Antitrust Act (26 Stat. 209). Respondent therefore avers that the contempt committed by petitioner is expressly excepted from the provisions of Section 22 of the Clayton Act by Section 24 of said Act, and that the punishment for said contempt is governed by the usages at law and in equity prevailing prior to the enactment of the Clayton Act (October 15, 1914), and by the provisions of Section 268 of the Judicial Code (28 U. S. C. A., sec. 385), which, in recognition of the inherent power of the courts to punish contempts, provides:

70 "The said courts shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistence by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

Respondent avers that the sentences under which petitioner is now imprisoned were imposed in conformity with Section 268 of the Judicial Code.

13. Respondent avers that the petition fails to state facts sufficient to show that petitioner's sentence of two years is invalid or excessive or that he is entitled as a matter of law to be discharged from the custody of respondent.

14. Answering further, respondent avers that after petitioner was convicted and sentenced for contempt, as aforesaid, he petitioned for an appeal to the United States Circuit Court of Appeals (Exhibit 6), assigning as error (Exhibit 7) the order of the court sentencing him for a period of two years on the Fifth and Sixth paragraphs of the Information and for a period of one year and a day on the Fourth paragraph of the Information; that said appeal was allowed on June 21, 1934 (Exhibit 7); and that upon motion of petitioner the United

States District Court for the Southern District of New York on June 29, 1934, entered an order discontinuing and withdrawing said appeal (Exhibit 8).

71 15. Answering further, respondent avers that petitioner Joseph Weiner was sentenced July 5, 1933, to an indeterminate sentence of three years by the Court of Special Sessions of Bronx County, New York; that thereafter the Parole Commission of New York fixed petitioner's sentence at a period substantially less than three years because of the fact that the United States District Court for the Southern District of New York had sentenced petitioner to two years (Exhibit 12, pp. 51, 72); and that petitioner's aforesaid appeal to the United States Circuit Court of Appeals was withdrawn prior to the fixing of the three-year indeterminate State sentence and for the manifest purpose of obtaining a reduction of said three-year indeterminate sentence.

16. Respondent attaches hereto and makes a part hereof certified copies of:

Ex. 1. Warrant of commitment of March 29, 1934, in Criminal Case No. 95–434 (United States v. Joseph Weiner et al.).

Ex. 2 Amended Warrant of commitment of June 5, 1934, in Criminal Case No. 95–434.

Ex. 3. Order of April 14, 1934, continuing term of Court as to Joseph Weiner in Criminal Case No. 95–434.

Ex. 4. Petition of Samuel Kaufman for an extension of the term of Court as to Joseph Weiner in Criminal Case No. 95–434.

Ex. 5. Notice of and affidavit in support of motion for modification of sentence of Joseph Weiner in Criminal Case No. 95–434.

Ex. 6. Petition for Appeal of Joseph Weiner in Criminal Case No. 95–434.

72 Ex. 7. Order allowing Appeal and Assignment of Errors of Joseph Weiner in Criminal Case No. 95–434.

Ex. 8. Order and Stipulation discontinuing Appeal of Joseph Weiner in Criminal Case No. 95–434.

Ex. 9. Docket entries in Criminal Case No. 95–434.

Ex. 10. Opinion of trial judge in Criminal Case No. 95–434.

Ex. 11. Opinion of trial judge in Equity Case No. 52–30 (suit to enjoin the petitioner Joseph Weiner).

There is also attached and made a part hereof Exhibit 12 a verified copy of the transcript of the hearing on petitioner Joseph Weiner's application for modification of sentence in Criminal Case No. 95–434.

Wherefore respondent prays that the petition of Joseph Weiner be dismissed, that the writ be discharged, and that petitioner be remanded to the custody of respondent.

HENRY C. HILL,
Warden, United States Northeastern Penitentiary, Lewisburg, Pa.

WALTER L. RICE,
Special Assistant to the Attorney General.

73 [*Duly sowrn to by Henry C. Hill, jurat omitted in printing.*]

[Clerk's certificate to following papers omitted in printing.]

74 Index

Ex. 1.—Commitment.
Ex. 2.—Amended Commitment.
Ex. 3.—Order Extending Time.
Ex. 4.—Petition for Extension of Time.
Ex. 5.—Notice of, and Affidavit in Support of, Motion for Modification of Sentence.
Ex. 6.—Petition for Appeal.
Ex. 7.—Order Allowing Appeal and Assignment of Errors.
Ex. 8.—Order and Stipulation Discontinuing Appeal.
Ex. 9.—Docket Entries.

Exhibit No. 1 to response

Commitment. D. C. Form No. 14 (Revised)

In the District Court of the United States of America for the Southern District of New York, ------ Division

The President of the United States of America

To the Marshal of the United States for the Southern District of New York and to the Warden of the ------ at ------, ------, Greeting:

75 Whereas, at the March term of said Court, 1934, held at New York, N. Y., in said district and division, to wit, on March 29, 1934, Joseph Weiner was sentenced by said Court, upon his conviction to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of Six months on paragraph 4 of Information, Two years on paragraphs 5 & 6 of Information. Sentences to run concurrently and to begin upon his release from N. Y. Penitentiary, Welfare Is., N. Y., and beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; violation of Decree E52-30 (Information in Contempt); Crim. 95-434.

And Whereas, the Attorney General of the United States has designated the ------ at ------, ------, as the place of confinement where the sentence of said Joseph Weiner shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Joseph Weiner and him safely transport to said Penitentiary and him there deliver to said Warden of said Penitentiary with a

copy of this writ; and you, the said Warden, to receive said Joseph Weiner and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

Witness the Honorable Francis G. Caffey, Judge of said
76 Court, and the seal thereof, affixed at New York, N. Y., in said district, this 29th day of March, 1934.

[L. S.]
[L. S.]

CHARLES WEISER, *Clerk.*
FRANCIS S. DAVIS, *Deputy Clerk.*

Return

I have executed the within writ in the manner following, to wit: On ------, 19--, I delivered said ------ to the ------ of the ------ temporarily pending transfer to the institution herein designated for the service of sentence, and on ------, 19--, I delivered said ------ to the ------ of ------ at ------, together with a copy of this commitment.

———— ————,
United States Marshal.
By ———— ————,
Deputy.

Filed Jan. 21, 1935, U. S. District Court, S. D. of N. Y.

77 *Exhibit No. 2 to response*

Amended commitment

Commitment. C95-434

In the District Court of the United States of America, Southern District of New York

C95-434

The President of the United States of America

To the Marshal of the United States for the Southern District of New York and to the Warden of the U. S. N. E. Pen., Lewisburg, Penna., greeting:

Whereas at the June term of said Court, 1934, held at New York City in said district and division, to wit, on June 5, 1934, the sentence of Joseph Weiner imposed on March 29, 1934, is modified and the deft. Weiner is sentenced by said Court, to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of One year and one day on Paragraph 4, Two years on Paragraph 5 and Two years on Paragraph 6. Sentence on Paragraphs 4, 5, and 6 to run concurrently, and to begin when sentence of State Court is ended. (Term of Court extended for 30 days

after opinion of C. C. A.), beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to
78 be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; violation of the provisions of final decree entered by this Court on February 6, 1932, in E52–30. (Contempt);

And whereas the Attorney General of the United States has designated the U. S. N. E. Pen., at Lewisburg, Penna., as the place of confinement where the sentence of said Joseph Weiner shall be served;

Now, this is to command you, the said marshal, forthwith to take said Joseph Weiner and him safely transport to said U. S. N. E. Pen., at Lewisburg, Penna., and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said Joseph Weiner and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

Witness, the Honorable Francis G. Caffey, Judge of said Court, and the seal thereof, affixed at New York, New York, in said district, this 5th day of June 1934.

[L. S.] CHARLES WEISER, *Clerk.*
D. G. S.

Return

I have executed the within writ in the manner following, to wit: On Dec. 7, 1934, I delivered said Joseph Weiner to the Supt. of the Detention Hdqts., N. Y. C., temporarily pending transfer to the institution herein designated for the service of sentence, and on Dec. 21, 1934, I delivered said Joseph Weiner to the Warden of
79 U. S. N. E. Pen., Lewisburg, Penna., together with a copy of this commitment.

RAYMOND J. MULLIGAN,
United States Marshal,
By ——— ———, Deputy,

Filed Jan. 21, 1935, U. S. District Court, S. D. of N. Y.

SIR: Please take notice that an order of which the within is a true copy will be presented for settlement and entry herein to Hon. Francis G. Caffey, District Judge, at his Chambers in the Woolworth Building Borough of Manhattan, City of New York, on the 14th day of May, 1934, at 10 o'clock in the forenoon of said day.

Dated New York, May 11, 1934.

Yours, Etc.,

SAMUEL H. KAUFMAN,
Attorney for Defendant,
JOSEPH WEINER,
Office and P. O. Address, 60 Wall Street,
Borough of Manhattan, City of New York.

To: MARTIN CONBOY, ESQ.,
United States Attorney for the Southern District of New York.

80 *Exhibit No. 3 to response*

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the Courthouse thereof, in the Old Post Office Building, Park Row and Broadway, in the Borough of Manhattan, City of New York, on the 14th day of May, 1934.

Present: Hon. Francis G. Caffey, District Judge.

#C95-434

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

Upon reading and filing the annexed petition of Samuel H. Kaufman, duly verified May 8th, 1934, and upon all the proceedings heretofore had herein, it is

On motion of Samuel H. Kaufman, attorney for the above-named defendant Joseph Weiner,

Ordered that the term of this Court at which the judgment of March 29, 1934, was rendered in the above-entitled proceeding, insofar as it relates to the defendant Joseph Weiner, be, and the same hereby, is extended to June 30, 1934, for the purpose of hearing and determining the application of the defendant Joseph Weiner now pending for a modification of the sentence imposed on him by this Court on March 29, 1934.

MARTIN G. CAFFEY,
U. S. D. J.

81 *Exhibit No. 4 to response*

United States District Court, Southern District of New York

#C95–434. Petition

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The petition of Samuel H. Kaufman respectfully shows to this Court and alleges:

1. That he is the attorney for the above named defendant Joseph Weiner.

2. That the said defendant was found guilty of criminal contempt of court under the fourth count and under the fifth and sixth counts of an information charging him with having violated the final decree of this Court made in a certain action entitled "United States of

America vs. The Greater New York Live Poultry Chamber of Commerce et al." (Equity No. 52-30).

3. On March 29, 1934, sentence was imposed on the defendant Joseph Weiner by Honorable Francis G. Caffey, one of the Judges of this Court, as follows:

"The sentence of the Court is that for the contempt of which
82 he stands convicted under count 4 the defendant Weiner be imprisoned in the United States House of Detention for the period of six months; and that for the contempt of which he stands convicted under counts 5 and 6, he be imprisoned in the penitentiary for a period of two years; service of the two years' sentence to begin when the defendant is released from the sentence that he is now serving under conviction in the state court. Insofar as lawful, I should be willing to arrange in the judgment that the six months sentence shall run concurrently with the two year sentence. Upon that question the parties may be heard. The term of the court will be extended as to the defendant Weiner until thirty days after the decision of the Court of Appeals in his case there pending, during which thirty days' period after the decision he may be heard upon notice to Mr. Rice and to the United States Attorney with respect to some modification of the arrangement requested by his counsel."

4. Thereafter and on April 17, 1934, the appeal referred to in the preceding paragraph hereof was decided by the Court of Appeals of the State of New York. The judgment of conviction of the defendant Joseph Weiner in the Court of Special Sessions of the City of New York of the crime of conspiracy to coerce was affirmed, and the defendant Joseph Weiner is now incarcerated in the City Penitentiary at Welfare Island, where he is serving the sentence imposed upon him by the Court of Special Sessions.

5. Thereafter and on May 4, 1934, in accordance with the
83 provision contained in the judgment of this Court, the defendant Joseph Weiner moved for an order modifying the sentence imposed upon him by this court on March 29, 1934. This motion came on to be heard on May 4, 1934, before Honorable Francis G. Caffey. The Court stated at that time that it would set the matter down for hearing on June 4, 1934, in order to give the defendant Joseph Weiner an opportunity to be heard in person on that date. The Court also stated that, due to the pressure of court business, it would not be able to set the matter down for hearing before June 4, 1934.

6. According to the judgment rendered on March 29, 1934, the term of the Court will end on May 17, 1934. The Court, at the time of the argument on May 4, 1934, directed that an order be entered extending the term of the Court to some date after June 4, 1934.

7. Your petitioner respectfully requests, therefore, that the term of this Court at which the judgment of March 29, 1934, was rendered, insofar as it relates to the defendant Joseph Weiner, be extended to June 30, 1934, for the same purpose as stated in the judgment of this

court rendered on March 29, 1934, and referred to in paragraph "3" hereof, for all of which no previous application has been made.

Dated: New York, May 8th, 1934.

SAMUEL H. KAUFMAN,
Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Samuel H. Kaufman, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true.

SAMUEL H. KAUFMAN.

Sworn to before me this 8th day of May 1934.

AARON RAMER,
Notary Public, N. Y. County.

N. Y. Co. Clk's No. 23, Reg. No. 5R203.
Bronx Co. Clk's No. 24, Reg. No. 101R35.
Kings Co. Clk's No. 54, Reg. No. 5288.
Commission expires March 30, 1935.

(On backing:) United States District Court, Southern District of New York. C95–434. United States of America, Petitioner, against Joseph Weiner et al., defendants. Original. Order and petition. Samuel H. Kaufman, Attorney for Defendant, Joseph Weiner, 60 Wall Street, Borough of Manhattan, New York City. Due and timely service of copy of the within ------ is hereby admitted this ------ day of ------, 19--. ------, Attorney for ------.

Should be notice for settlement or notice of settlement be waived.

May 9–34.

F. G. C.

Copy received May 11, 1934, Martin Conboy, U. S. Attorney.

Exhibit No. 5 to response

United States District Court, Southern District of New York

#C95–434. Notice of motion #17

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

SIR: Please take notice that upon the annexed affidavit of Samuel H. Kaufman, verified April 30, 1934, motion will be made herein at Room 235, Old Post Office Building, Broadway and Park Row, in the Borough of Manhattan, City and State of New York, on the

4th day of May 1934, at 10:30 A. M., or as soon thereafter as counsel can be heard, for an order modifying the sentence imposed on the defendant Joseph Weiner in the above-entitled proceeding on March 29, 1934, and for such other and further relief as to the Court may seem just and proper.

86 Dated: New York, April 30, 1934.

Yours, Etc.,

SAMUEL H. KAUFMAN,
Attorney for Defendant Joseph Weiner,
Office and P. O. Address, 60 Wall Street,
Borough of Manhattan, City of New York.

To: MARTIN CONBOY, ESQ.,
United States Attorney,
Southern District of New York.

Exhibit No. 5

United States District Court, Southern District of New York

#C95–434. Affidavit

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

STATE OF NEW YORK,
County of New York, ss:

Samuel H. Kaufman, being duly sworn, deposes and says:

I am the attorney for the above-named defendant Joseph Weiner.

87 I submit this affidavit in his behalf, to modify the sentence imposed on him by this Court on March 29, 1934.

The defendant Joseph Weiner was found guilty of original contempt of court under the fourth count and under the fifth and sixth counts of an information charging him with having violated the final decree of this Court made in a certain action entitled "United States of America vs. The Greater New York Live Poultry Chamber of Commerce et al." (Equity #52–30).

On March 29, 1934, sentence was imposed on the defendant Joseph Weiner by Honorable Francis G. Caffey, one of the Judges of this Court, as follows:

"The sentence of the court is that for the contempt of which he stands convicted under count 4 the defendant Weiner be imprisoned in the United States House of Detention for the period of six months; and that for the contempt of which he stands convicted under counts 5 and 6, he be imprisoned in the penitentiary for a period of two years; service of the two years sentence to begin when the defendant is released from the sentence that he is now serving under conviction in the state court. Insofar as lawful, I should be willing to arrange

in the judgment that the six months sentence shall run concurrently with the two year sentence. Upon that question the parties may be heard. The term of the court will be extended as to the defendant Weiner until thirty days after the decision of the Court of Appeals in his case there pending, during which thirty day period after the decision he may be heard upon notice to Mr. Rice and to
88 the United States Attorney with respect to some modification of the arrangement requested by his counsel."

Thereafter, and on April 17, 1934, the appeal referred to in the preceding paragraph hereof was decided by the Court of Appeals of the State of New York. The judgment of conviction of the defendant Joseph Weiner in the Court of Special Sessions of the City of New York of the crime of conspiracy to coerce was affirmed by a vote of four to two, without opinion, Crane and Lehman, JJ., dissenting on the ground that the defendant had been sentenced without a plea of guilty and without a trial of the facts of his guilt.

The defendant Joseph Weiner is now incarcerated in the City Penitentiary at Welfare Island, where he is serving the jail sentence imposed upon him by the Court of Special Sessions, for the term of from six months up to three years.

The acts of the defendant Joseph Weiner which formed the basis of the conviction in the state court, were essentially the same acts on which this court based its conviction under the fifth and sixth counts in the criminal contempt proceeding. For these acts, the defendant has been given an indeterminate prison sentence in the state court. For these same acts, as the judgment now stands, he has been sentenced in this court to two years' imprisonment in a penitentiary under the fifth and sixth counts of the information. In addition (under the fourth count of the information), the defendant Joseph Weiner has been sentenced to imprisonment in the United States House of Detention for a period of six months.

In accordance with the provision contained in the judgment of this Court, rendered on March 29, 1934, extending the term of the
89 Court for the purpose of permitting the defendant Joseph Weiner to make this application, I respectfully move for a modification of the sentence imposed on the defendant Joseph Weiner by this Court on March 29, 1934, and for such other and further relief as to the Court may seem just and proper.

SAMUEL H. KAUFMAN.

Sworn to before me this 30th day of April 1934.

AARON RAMER,
Notary Public N. Y. Co.

N. Y. Co. Clk's No. 23, Reg. No. 5R203.
Bronx Co. Clk's No. 24, Reg. No. 101R35.
Kings Co. Clk's No. 51, Reg. No. 5288.
Commission expires March 30, 1935.

(On backing:) United States District Court: Southern District of New York, United States of America, petitioner, against Joseph Weiner et al., defendants. Original. Notice of motion and affidavit.

Samuel H. Kaufman, attorney for Defendant Joseph Weiner, 60 Wall Street, borough of Manhattan, New York City. Due and timely service of copy of the within ------ is hereby admitted this ------ day of ------, 19--. ------, attorney for ------.

90 Copy received Apr. 30, 1934, Martin Conboy, U. S. attorney.

Exhibit No. 6 to response

United States District Court, Southern District of New York

Petition for appeal

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

To the honorable the judges of the United States District Court for the Southern District of New York:

Now comes petitioner, Joseph Weiner, and respectfully represents that on March 29, 1934, at a trial before Honorable Francis G. Caffey without a jury, petitioner was found guilty of contempt of court on the fourth count and on the fifth and sixth counts of an information charging petitioner with violating the final decree of the United States District Court for the Southern District of New York, made and entered therein on February 6, 1932, in a proceeding entitled "United States of America v. The Greater New York Live Poultry Chamber of Commerce et al." (Equity #52-30); and that a judgment was made and entered in said District Court on March 29, 1934, sentencing petitioner under the fourth count of the information to be imprisoned in the United States House of Detention

91 for a period of six months, and sentencing petitioner under the fifth and sixth counts of the information to be imprisoned in the penitentiary for a period of two years, the two sentences to run concurrently insofar as lawful, and service of the two years' sentence to begin when petitioner was released from the sentence that he is now serving under conviction in the state court; and that the term of the said District Court as to petition was extended until thirty days after the decision of the Court of Appeals of the State of New York in the petitioner's case there pending, for the purpose of permitting petitioner to move for a modification of the judgment of March 29, 1934, with respect to the provision in said judgment that the six-months' sentence run concurrently with the two-years' sentence; and that thereafter and on June 5, 1934, said judgment of March 29, 1934, was modified by order of said District Court, and petitioner was sentenced under the fifth and sixth counts of the information to be imprisoned in the penitentary for a period of two years, and petitioner was sentenced under the fourth count of the information to be imprisoned in the penitentary for a period of one

year and a day, the sentence of two years to run concurrently with the sentence of one year and a day, and service of the two-years' sentence to begin when petitioner is released from the sentence that he is now serving under conviction in the state court.

Petitioner being desirous of securing a review of said judgment of March 29, 1934, and of said judgment as modified by the District Court on June 5, 1934, respectfully prays that an appeal may be
92 allowed from said judgment to the United States Circuit Court of Appeals for the Second Circuit.

KAUFMAN, WEITZNER & CELLER,
Attorneys for Defendant, Joseph Weiner, Office and P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

To MARTIN CONBOY, ESQ.,
United States Attorney for the Southern District of New York, Old Post Office Building, Broadway and Park Row, Borough of Manhattan, City of New York.

Exhibit No. 7 to response

Order allowing appeal

On reading the petition of Joseph Weiner for an appeal herein, and on consideration of the assignment of errors presented herewith, it is

Ordered that the appeal prayed for be, and the same hereby is, allowed to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of convicition entered herein on March 29, 1934, and from said judgment as modified by the District Court on June 5, 1934.

93 Dated New York, June 21, 1934.

WOOLSEY, *U. S. D. J.*

United States District Court, Southern District of New York

Assignment of errors

UNITED STATES OF AMERICA, COMPLAINANT AND PETITIONER
vs.
JOSEPH WEINER ET AL., DEFENDANTS

Now comes Joseph Weiner, one of the defendants herein, by Kaufman, Weitzner & Celler, his attorneys, and in connection with his petition for an order allowing his appeal, says that in the record, proceedings, and judgment herein error has intervened to his prejudice as follows:

First. The court erred in denying the motion of this defendant, made at the close of the evidence offered on behalf of the United States of America, to dismiss the information filed against this defendant, on the ground that such evidence failed to show any violation by this defendant of the decree of this court, entered February 6, 1932.

Second. The Court erred in denying the motion of this defendant, made at the close of all the evidence offered and received on behalf of the United States and on behalf of this defendant, to dismiss the information filed against this defendant, and to adjudge this defendant not guilty, on the ground that all of the evidence offered
94 and received failed to show that any offense as charged in the information herein had been committed by this defendant.

Third. The Court erred in entering judgment against and in passing sentence upon this defendant in that the evidence offered and received at the trial wholly failed to show the commission by this defendant of any offense set forth and described in the information herein.

Fourth. The Court erred in entering judgment against and in passing sentence upon this defendant in that the evidence failed to show the existence of any intent, criminal or otherwise, on the part of this defendant to violate the injunction of this court entered on February 6, 1932, as alleged in the information.

Fifth. The court erred in refusing to grant the motion of this defendant to arrest judgment upon its verdict, and erred in passing sentence upon this defendant pursuant to said judgment.

Sixth. The judgment is against the law and the evidence.

Seventh. The sentence and judgment of the court as to this defendant is so cruel and unusual that it is clearly in violation of this defendant's rights under the Eighth Amendment to the Constitution of the United States of America.

Eighth. The court erred in sentencing this defendant to the penitentiary for a period of two years on the fifth and sixth counts of the information.

Ninth. The court erred in sentencing this defendant to the penitentiary for a period of one year and a day on the fourth count of the information.

95 Tenth. The court erred in sentencing this defendant to the penitentiary for a period of two years on the fifth and sixth counts of the information, in violation of this defendant's rights under the Fifth Amendment to the Constitution of the United States of America.

Eleventh: The court erred in sentencing this defendant to the penitentiary for a period of one year and a day on the fourth count of the information, in violation of this defendant's rights under the Fifth Amendment to the Constitution of the United States of America.

Wherefore, this defendant prays that the judgment herein may be reversed and annulled and altogether held for nothing, and that this defendant may be restored to all things which he has lost by reason of said judgment.

Dated: New York, June 18th, 1934.

KAUFMAN, WEITZNER & CELLER,
Attorneys for Defendant, Joseph Weiner, Office and P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

(On Backing:) United States District Court: Southern District of New York, United States of America, petitioner, against Joseph Weiner et al., defendants.

96 Original. Petition for appeal, order allowing appeal and assignment of errors. Kaufman, Weitzner & Celler, Attorneys for Defendant, Joseph Weiner, 60 Wall Street, Borough of Manhattan, New York City. Filed Jun. 25, 1934, U. S. District Court, S. D. of N. Y. Due and timely service of copy of the within ------ is hereby admitted this ------day of------, 19--. ------, Attorney for ------.

Exhibit No. 8 to response

United States District Court, Southern District of New York

Order

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

Upon the annexed stipulation, entered into between the attorney for the Petitioner and the attorneys for the defendant Joseph Weiner, bearing date June 29, 1934, and upon all the proceedings heretofore had herein,

97 Now on motion of Kaufman, Weitzner & Celler, attorneys for the defendant Joseph Weiner, it is hereby ordered that the appeal by the defendant Joseph Weiner, to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of conviction entered herein on March 29, 1934, and from said judgment as modified on June 5, 1934, which appeal is now pending, be and the same hereby is, discontinued and withdrawn.

Dated: New York, June 29th, 1934.

WOOLSEY,
U. S. District Judge.

United States District Court, Southern District of New York

Stipulation discontinuing appeal

UNITED STATES OF AMERICA, PETITIONER

vs.

JOSEPH WEINER ET AL., DEFENDANTS

It is hereby stipulated by and between the attorneys for the respective parties hereto that the appeal by the defendant Joseph Weiner to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of conviction entered herein on March 29, 1934, and from said judgment, as modified on June 5, 1934, which appeal is now pending, be, and the same hereby, is discontinued and withdrawn.

98 Dated: New York, June 29, 1934.

MARTIN CONBOY,
U. S. Attorney, Attorney for Petitioner.
Per R. P. WHEARLY,
Asst. U. S. Atty.
KAUFMAN, WEITZNER, & CELLER,
Attorneys for Defendant, Joseph Weiner.

C95–434. United States District Court, Southern District of New York, United States of America, petitioner, against Joseph Weiner et al., defendants. Original. Order and stipulation. Kaufman, Weitzner & Celler, Attorneys for Defendant Joseph Weiner, 60 Wall Street, Borough of Manhattan, New York City. Filed Jun. 30, 1934, U. S. District Court, S. D. of N. Y. Due and timely service of copy of the within ------ is hereby admitted this ------ day of ------, 19--. ------- Attorney for -------.

99 *Exhibit No. 9 to response*

Docket entries

Title of Case—The United States vs. Joseph Weiner, Arthur Herbert (alias "Tootsie" Herbert), Charles Herbert, Max Keslin, Harry Schomer, Sidney Rosenstein, Aaron Weissler (alias "Arke"), Harry Frankel, Local No. 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Local 440 of the Poultry Shochtim Union of Greater New York, and Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc.

Violation of Contempt of Court.

Proceedings

July 31, 1933. Filed Information.
July 31, 1933. Filed Rule to Show Cause, Coxe, J.
July 31, 1933. Filed Motion for Rule to Show Cause.

Aug. 7, 1933. Filed Rule to Show Cause.
Aug. 21, 1933. Filed Rule to Show Cause, Patterson, J., with four certificates of service attached.
Aug. 21, 1933. Filed copy of rule to show cause, Patterson, J., with admission of service endorsed.
Aug. 21, 1933. Filed Copy of Rule to show cause, Coxe, J., with admission of service endorsed, and four certificates of service attached.
Aug. 21, 1933. Filed notice of appearance, Kaufman, Weitzner & Celler.
Aug. 21, 1933. Joseph Weiner pleads not guilty, bail $5,000.
100 Arthur Herbert pleads not guilty, bail $5,000.
Charles Herbert pleads not guilty, bail $5,000.
Max Keslin pleads not guilty, bail $3,500.
Harry Schomer pleads not guilty, bail $3,500.
Sidney Rosenstein pleads not guilty, bail $5,000.

United States District Court

C95-434

United States vs. Joseph Weiner et al.

Aug. 21, 1933. Aaron Weissler pleads not guilty, bail $5,000.
Harry Frankel pleads not guilty, bail $2,500.
Defts. paroled in custody of counsel to give bail.
Aug. 21, 1933. Local 167, International Brotherhood of Teamsters, Chauffeurs, etc., pleads not guilty, by counsel.
Aug. 21, 1933. Local 440 of the Poultry Shochtim Union of Greater N. Y., pleads not guilty, by counsel.
Aug. 21, 1933. Local 440 of the Official Orthodox Poultry Slaughterers of America, Inc., pleads not guilty, by counsel.
Aug. 22, 1933. Filed Recognizance, Joseph Weiner, $5,000, Concord Cas. Co.
Aug. 22, 1933. Filed Recognizance, Sidney Rosenstein, $5,000, Concord Cas. Co.
Aug. 22, 1933. Filed Recognizance, Max Keslin, $3,500, Concord Cas. Co.
Aug. 22, 1933. Filed Recognizance, Arthur Herbert, $5,000, Concord Cas. Co.
101 Aug. 22, 1933. Filed recognizance, Charles Herbert, $5,000, Concord Cas. Co.
Aug. 22, 1933. Filed recognizance, Harry Frankel, $2,500, Concord Cas. Co.
Aug. 22, 1933. Filed recognizance, Harry Schomer, $3,500, Concord Cas. Co.
Aug. 22, 1933. Filed recognizance, Aaron Weissler, $5,000, Concord Cas. Co.

Sept. 28, 1933. Filed notice of motion and affidavit.

Motion for bill of particulars—Overruled—Exception. (Memorandum endorsed) Kennedy, J.

Oct. 23, 1933. Filed order denying motion for a bill of particulars, Kennedy, J.

Feb. 19, 1934. Case called for trial. Harry Schomer not present. Testimony taken as to illness of Harry Schomer. Bench warrants ordered for the following witnesses: Samuel Weiner, Sam Shipper, Hyman Black, Abe Slanowitz, Sam Simberg—Adjd. until Feb. 20, 1934, Caffey, J.

Feb. 20, 1934. Raymond J. Riley, trial counsel for Harry Schomer, decision reserved as to forfeiture of bail of defts. Schomer and Frankel. Adjd. until Feb. 21, 1934.

Feb. 21, 1934. Defts. waive jury trial. Trial begun without the presence of a jury as to J. Weiner, A. Herbert, C. Herbert, S. Rosenstein, H. Frankel, Max Keslin, and Aaron Weissler and the three unions. Caffey, D. J.

Trial cont'd Feb. 22, 23, 26, 27, 28, Mar. 1, 2, 5, 6, 7, 8, 9, 12, 13.

Feb. 15, 1934. Gov't rests.

Mr. Kaufman moves to dismiss the information, denied exc.

102 Mr. Kaufman moves to dismiss certain paragraphs in the information—Sustained as to paragraphs 23, 24 & 26. Denied as to all other motions exc. Mr. Perlman & Mr. Riley make like motions denied exc.

Feb. 16, 1934. Mr. Kaufman, atty. for defts., ill.

Feb. 19, 1934. Trial cont'd. S. Rosenstein ill counsel stipulate to continue without presence of deft. Rosenstein.

Trial con't. Feb. 20, 1934, 21, 23, 26.

Feb. 27, 1934. Trial cont'd defts. rest. Gov't rests.

Feb. 28, 1934. Mr. Kaufman moves to dismiss the information against all of the defendants on the grounds stated at the close of the government's case; also moves for an acquittal of the defendants on the ground that the government has totally failed to establish the allegations of the information. Denied exc.

Mr. Kaufman argues to court.

Mr. Perlman argues to court.

Mr. Rice argues to court.

Mar. 29, 1934. Mr. Rice argues to court.

Motion to forfeit bail of Harry Schomer denied.

Verdict:

Joseph Weiner, guilty of paragraphs 4, 5 & 6.

Arthur Herbert, guilty of paragraph 4.

Sidney Rosenstein, guilty of paragraph 4.

Harry Frankel, guilty of paragraph 11.

Max Keslin, guilty of paragraphs 12, 13, 16 & 17.

103 Above named defendants acquitted on all other paragraphs.

Aaron Weissler, Charles Herbert, and the three unions acquitted.

Sentences:

Joseph Weiner—On paragraph 4—Six Months at Detention Hdqtrs. N. Y. C.—On paragraph 5 & 6—Two Years at a place of confinement to be designated by the Atty. Gen'l. Sentences to run concurrently and to commence upon release of deft. from N. Y. Penitentiary, Welfare Island, N. Y. Term of court is extended until after the decision of the C. C. A. of New York. Issued committments in triplicate.

Sidney Rosenstein—Sentenced to Six months at Detehtion Headquarters N. Y. C. Execution of sentence stayed until April 2, 1934, Bail cont'd. Issued committment in duplicate.

Harry Frankel—Sentenced to three months at Detention Headquarters N. Y. C. Execution of sentence stayed until April 2, 1934. Bail cont'd. Issued committment in duplicate.

Max Keslin—Sentenced to three months at Detention Headquarters N. Y. C. Execution of sentence stayed until April 2, 1934, Bail cont'd. Issued committment in duplicate.

Caffey, D. J.

Apr. 4, 1934. Filed Opinion No. 8318, Caffey, J.
Apr. 2, 1934. Filed Petition and order allowing appeal as to Harry Frankel—$5.00.
Apr. 2, 1934. Filed Petition and order allowing appeal as to Max Keslin—$5.00.
Apr. 2, 1934. Filed Petition and order allowing appeal as to Sidney Rosenstein—$5.00.
104 Apr. 2, 1934. Filed Petition and order allowing appeal as to Arthur Herbert—$5.00.
Apr. 6, 1934. Filed Citation on appeal as to Harry Frankel.
Apr. 6, 1934. Filed Citation on appeal as to Max Keslin.
Apr. 6, 1934. Filed Citation on appeal as to Sidney Rosenstein.
Apr. 6, 1934. Filed Citation on appeal as to Arthur Herbert.
Apr. 30, 1934. Filed note of issue—for modification of sentence imposed on Joseph Weiner—Returnable May 4, 1934.
May 14, 1934. Filed petition and order extending term of court to June 4, 1934. Before Francis G. Caffey, J.
June 1, 1934. Filed Affidavit and notice of motion for an order awarding the costs of prosecution, including Grand Jury costs, to the United States.
June 1, 1934. Filed Supplemental Affidavit of Raymond P. Whearty.
June 1, 1934. Filed Bill of Grand Jury costs.
June 1, 1934. Filed Bill of Costs.
June 1, 1934. Filed Affidavit of Samuel H. Kaufman in opposition.
June 1, 1934. Filed Opinion No. 8455, Caffey, J.
June 4, 1934. Before Francis G. Caffey, J.
Motion of defendant Weiner, for modification of sentence heard.
June 5, 1934. Hearing of motion continued—Sentence modified to read:

105 "On paragraphs 5 and 6—2 years in the Penitentiary, service to begin when sentence of State Court is ended—On Paragraph 4—1 year and a day in the Penitentiary, sentence on paragraph 4 to run concurrently with sentence on paragraphs 5 and 6—Term of court extended for 30 days after opinion by C. C. A. Consented to by Defendant and Counsel on both sides."

June 5, 1934. Issued amended commitment as to Joseph Weiner.

June 6, 1934. Motion to have Defts. Arthur Herbert, Max Keslin, Sidney Rosenstein and Harry Frankel, substitute bail denied—Bails given in C. C. A.

June 6, 1934. Harry Schomer adjd. to June 7, 1934.

June 5, 1934. Filed Affidavit and notice of motion for an order modifying sentence as to Joseph Weiner.

June 15, 1934. Filed Bill of Costs and Notice of Motion.

June 18, 1934. Filed order granting motion for the United States to recover Trial costs, including the fees of the Clerk, and further ordered that the motion for Grand Jury costs be denied.

Caffey, J.

June 22, 1934. Filed Judgment No. 34,266 vs. Joseph Weiner, Arthur Herbert, Sidney Rosenstein, Max Keslin, and Harry Frankel, $500.30.

106 June 22, 1934. Filed order that the appellants herein are required to furnish bail bonds in addition to the bonds heretofore filed and approved in the following amounts: Arthur Herbert, $2,500, Sidney Rosenstein $2,500, Max Keslin $1,250, and Harry Frankel $1,250. Manton, C. J.

June 25, 1934. Filed Petition for Appeal, order allowing appeal and assignment of errors, as to Joseph Weiner.

June 27, 1934. Filed Bond on Appeal as to Sidney Rosenstein $2,500, Continental Cas. Co.

June 27, 1934. Filed Bond on Appeal as to Harry Frankel $1,250, Continental Cas. Co.

June 27, 1934. Filed Bond on Appeal as to Arthur Herbert $2,500, Continental Cas. Co.

June 27, 1934. Filed Bond on Appeal as to Max Keslin $1,750, Continental Cas. Co.

June 28, 1934. Filed Affidavit and order extending term of Court up to and including July 29, 1934. Woolsey, J.

June 29, 1934. Filed Affidavit and order extending term of Court up to and including July 29, 1934. Caffey, J.

June 30, 1934. Filed Stipulation aand order withdrawing and discontinuing appeal as to Joseph Weiner, Woolsey, J.

July 10, 1934. Issued Execution.

July 30, 1934. Filed Affidavit, consent and order extending the term of the Court, for the purpose of allowing bills of exceptions up to and including August 29, 1934. Knox, J.

107 Aug. 3, 1934. Filed consent, affidavit, and order extending the term of Court up to and including August 29, 1934. Caffey, J.

Aug. 16, 1934. Issued Certf. on appeal to C. C. A.

Aug. 16, 1934. Filed transcript of record (3 volumes).

Sept. 12, 1934. Filed execution vs. property No. 34266 (Nulls Bono 9–6–34).

Nov. 21, 1934. Filed affidavit and order to show cause why an order should not be made staying the execution of sentence of Joseph Weiner. Memo. endorsed as follows—"On consent to be released on bail of $5,000 to Dec. 7, 1934, on condition he report daily at Probation Office in U. S. Court and Post Office Building. (Except Sundays.) Settle order—Francis G. Caffey, U. S. D. J."

Nov. 21, 1934. Filed Mandate of U. S. C. C. A. affirming judgment of District Court as to Arthur Herbert et al.

Nov. 23, 1934. Filed Recognizance Joseph Weiner, $5,000, Bertram Fagenson Surety.

Nov. 21, 1934. Filed order staying execution of sentence of Joseph Weiner to 12–7–34, and admitting defendant to bail. Caffey, J.

Dec. 31, 1934. Defendants Arthur Herbert, Sidney Rosenstein, Max Keslin, and Henry Frankel surrendered to U. S. Marshal. Coxe, J.

Nov. 30, 1934. Filed order on mandaate that the mandate of the N. L. C. C. A. be made the judgment of this Court and that Arthur Herbert, Sidney Rosenstein, Max Keslin, and Harry Frankel surrender themselves to the United States Marshal on December 3, 1934, and Memo. endorsed thereon. Caffey, J.

108 Dec. 12, 1934. Filed affidavit and proposed order staying execution of sentence of Joseph Weiner up to 12–14–34 and that bail of $5,000 be continued during the period of extension. Memo. End. Denied. Caffey, J.

Dec. 7, 1934. Filed Recognizance Harry Schomer, $3,500, Continental Cas. Co.

Dec. 13, 1934. Filed Bench Warrant with Marshal's return as to Joseph Weiner, Defendant, arrested 11–23–34.

Jan. 8, 1935. Issued Writ of Habeas Corpus to Supt. of Det. Hdqts., N. Y. C. Re Arthur Herbert. Retble. 1–11–35 in Room 235.

Jan. 8, 1935. Issued Writ of Habeas Corpus to Supt. of Det. Hdqts. N. Y. C. Re Sidney Rosenstein. Retble. 1–11–35 in Room 235.

Jan. 10, 1935. Filed note of issue as to Sidney Rosenstein. Suit for collection of costs on judgment. Ret. 1–11–35.

Jan. 10, 1935. Filed note of issue as to Arthur Herbert. Suit for collection of costs on judgment. Ret. 1–11–35.

Jan. 14, 1935. Filed commitment and entered return Harry Frankel delivered to Det. Hdqts., N. Y. C., 12–3–34.

Jan. 14, 1935. Filed commitment and entered return Arthur Herbert delivered to Det. Hdqts., N. Y. C., 12–3–34.

109 Jan. 14, 1935. Filed commitment and entered return Max Keslin delivered to Det. Hdqts., N. Y. C., 12–3–34.

Jan. 14, 1935. Filed commitment and entered return Sidney Rosenstein delivered to Det. Hdqts., N. Y. C., 12–3–34.
Jan. 21, 1935. Filed commitment as to Joseph Weiner.
Jan. 21, 1935. Filed commitment and entered return Joseph Weiner delivered to U. S. N. E. Pen., Lewisburg, Pa., 12–21–34.

Exhibit No. 10 to response

United States District Court, Southern District of New York

C 95/434

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOSEPH WEINER, ARTHUR HERBERT, ALIAS "TOOTSIE" HERBERT, CHARLES HERBERT, MAX KESLIN, HARRY SCHOMER, SIDNEY ROSENSTEIN, AARON WEISSLER, ALIAS "ARKE", HARRY FRANKEL, LOCAL 167 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN & HELPERS OF AMERICA, LOCAL 440 OF THE POULTRY
110 SHOCTIM UNION OF GREATER NEW YORK, AND LOCAL 440 OF THE OFFICIAL ORTHODOX POULTRY SLAUGHTERERS OF AMERICA, INC., DEFENDANTS

New York, March 29, 1934.

Before Hon. Francis G. Caffey, District Judge.

Appearances: Martin Conboy, Esq., United States Attorney, for the Government; Walter L. Rice, Esq., Special Assistant to the Attorney General; Raymond P. Whearty, Assistant United States Attorney. Kaufman, Weitzner & Celler, Esqs., Attorneys for Defendants Joseph Weiner, Arthur Herbert, Charles Herbert, Max Keslin, Sidney Rosenstein, Harry Frankel, and Local No. 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America; Samuel H. Kaufman, Esq., of Counsel. Blau, Perlman & Polakoff, Esqs., Attorneys for Local No. 440 of the Poultry Shoctim Union of Greater New York; Nathan D. Perlman, Esq., of Counsel. Raymond J. Riley, Esq., Attorney for Defendant Harry Schomer.

111 Opinion

The COURT (orally): The defendant Schomer is not on trial. An arrangement was made, as appears on the record, with respect to the taking of testimony which might affect him and for its use at a future trial; but he not being on trial now, nothing said or done in disposing of the case, as it affects the remaining defendants, is to be taken as applying to him. He is entitled to a full and fair hearing before any conclusion is reached in respect to any of the things

charged in the information against him. Accordingly, it is to be clearly understood that nothing I shall say hereafter in the present trial concerns the defendant Schomer.

My comments will be brief. I have reviewed all the testimony; much of it several times. After the arguments yesterday I again reviewed phases of it which appeared to me to be material for further consideration, in the light of the contentions made by counsel.

It is undisputed that there is a presumption of the innocence of the defendants. The case starts out therefore with the duty on the Government of establishing guilt by evidence before there can be a conviction. In addition, the law prescribes that the measure of proof of guilt shall be beyond reasonable doubt before there can be a conviction.

It is also without dispute that we are here concerned only with the decree of February 6, 1932, which is our guide or test in determining whether or not there is guilt.

112 We are not concerned with labor or with unions or with rival unions. We are not concerned with delegates or with individuals, save only to the extent that it may be charged and proved that there has been violation of the decree or that there has not been proof beyond a reasonable doubt of such violation.

It has been argued that the decree is not applicable to the Schoctim Union or to the defendant Frankel, because they were not parties to the injunction suit. I think this contention is without merit. It is plain that both had knowledge of the injunction. It was not necessary for them to be parties in order to be bound by it if they come within the class of those who under the law are bound by an injunction. This class has been adequately defined by the Supreme Court in Ex parte Lennon, 166 U. S., to embrace the confederates and associates of any of the parties if the decree so provide.

The Schoctim Union and Frankel are included in the prohibitions of an injunction framed as was the injunction in the present instance. It covers all who are associates or confederates of those who were parties to the injunction litigation. Here plainly the Schoctim Union and Frankel, as demonstrated by the proof beyond a reasonable doubt, are and throughout the relevant times have been confederates and associates of those who were parties to the injunction suit and were enjoined by the decree.

You will observe the principle commented on by Mr. Justice Brandeis in Chase National Bank v. Norwalk, a decision of the Supreme Court handed down on March 5 of this year, during the progress of this trial. It is reported in the 78th volume of the Lawyers' Cooperative edition of the Reports of the Supreme Court, at page 629.

113 The consequence is that we approach the case, as it affects the defendant Schoctim Union and the defendant Frankel, precisely as we approach it with respect to all the other defendants on trial.

So also the suggestion by counsel of the necessity of service of the injunction upon the defendants in order to bind them, or to fix a date from which they were bound, is without merit. It is established beyond the realm of controversy that each of the defendants had knowledge of the injunction at the time of the occurrence of any of the events which it is material to consider on this trial. In that respect, as I pointed out at the time I disposed of the injunction trial, the Federal law is different from the State law. Under the Federal law there is no necessity, as there is under the State law, of service of an injunction order or of a certified copy of it. Knowledge, even though obtained merely through a newspaper statement, of an injunction by a Federal court puts it into effect so far as concerns its prohibitions against all who by its terms are to be bound.

The determination of this case turns on the credibility of witnesses and the weight of evidence.

Preceding commencement of the trial, counsel were not in accord on the question as to whether or not the defendants were entitled to a trial by jury. Without that question being passed on by the court, the present trial has been conducted, by consent of both sides, without a jury.

There has been at this trial a great deal of false testimony—manifestly false. I have always been loath to comment on a particular witness and to characterize the testimony given by him as false.

One reason is that, as part of the institutions of the
114 country, the judge is put in a position where he may do great injustice by comment. He is permitted the use of power which should be employed with great caution. It is nothing less than cowardly on the part of a judge recklessly to denounce individuals who are helpless and without remedy. His criticism should, therefore, be confined to occasions where necessary in the discharge of the judicial duties imposed on him.

Here I do not find need to name individuals who, in my judgment—as one somewhat experienced in trials and in applying that experience to the conduct of witnesses after having listened to them patiently and with care—I feel absolutely certain have wilfully told things that are untrue and which they knew to be untrue. So I shall withhold comment on witnesses of that type, because it is not necessary.

In addition, in so far as practicable in disposing of this case, I shall refrain not alone from the mention of individual witnesses, but also even from a form of expression which might identify the witnesses, upon whose truthfulness I rely in reaching the conclusions I shall reach.

There have been several extraordinary things about the present trial.

It has been demonstrated by comparisons of statements made by numerous witnesses on the stand with prior statements made by them —some of which were under oath—that there have been many changes in their testimony. I can only speculate as to why there have been

these changes. I do not know why. Whether it is the consequence of persuasion, or whether it is mere evasion, or whatever the reason,

I am unable to say, because the evidence does not enable me
115 to say with certainty. I must take the testimony as given. I cannot reach a judgment in this case save as it is founded on the evidence.

Another unusual feature of this case is that there is a difference—and it has been demonstrated by the proof to a marked difference—between the testimony of witnesses called here whose names or whose relationships or whose connections with concerns named in the information were not revealed, but who came as fresh witnesses, whose identity could not have been ascertained by the most diligent inquiry based on an examination of the information itself, and the testimony of witnesses whose names either were given in or whose identity could be traced through following up the allegations of the information.

The two characteristics of the trial I have mentioned put me on guard as matter of judicial duty, as I conceive it, in the administration of the law, not to incur the danger of subjecting either to persuasion or to any other form of pressure or annoyance, those on whose testimony I rely, and who I believe to be truthful, lest hereafter they be regarded as individuals who have brought about or as having some responsibility for bringing about the result of this case.

The situation as affects the administration of the law is worse. I do not charge the defendants with responsibility for it. Nevertheless, if I am to do my part, as I see my obligation, I cannot fail to take the facts into account in the formulation of the remarks I made today. I feel impelled to shape them in such way that they will not be a revelation of the names or identity of the witnesses on whose testimony I rely.

116 We sat for about five weeks in the New York County Courthouse. There was assembled there almost daily an audience which has given a great deal of trouble to officials of this court assigned to duty at the trial. Those officials have conducted themselves with great propriety and restraint. They had irritation enough to warrant their calling upon the court for action; but they did not. I could not fail to observe—as I was informed—what was in progress.

The situation goes further. There occurred there an incident the like of which is outside of my experience in a trial. A respectable witness, who in my judgment had spoken the whole truth and had done it with moderation, when he was called in obedience to a subpoena to testify, when he reached the audience just after he had left the stand—as he informed me later, and I believe truthfully informed me—was abused in the court room and in effect threatened with violence because of the testimony he had given. He was put in fear of bodily harm. So much so that, though the culprit could not be traced, under the direction of the court the witness was given the

protection of a representative of the Marshal in getting away to safety.

I make these remarks because it is the explanation of why I am not going to name witnesses or, in so far as I can avoid, express a view which will identify particular witnesses.

I repeat that I do not charge the defendants with responsibility for the court-room events I have described. I do not know who the people were in the audience; but I do know what happened. In the light of the circumstances recited, I believe it to be a part of
117 the duty of the court to avoid subjecting to peril—if peril there be—or even to inconvenience people who, under the process of the court, have testified and as I believed have testified truthfully.

In subdivision III of the information there are 26 counts for consideration. These are numbered from 4 to 29 as paragraphs of the information.

A good deal of testimony has been given with respect to occurrences which are not within the description of alleged offenses covered by the 26 counts. No consideration, however, will be given to the question as to whether the defendants or any of them are guilty of any of the acts covered by the testimony with respect to matters outside of the 26 counts. But, as I indicated to counsel during the trial, the testimony of similar acts was admissible and is relevant for consideration in the determination of the probabilities and of the significance of acts specifically described in the 26 counts of the information as to which testimony has been given.

There are certain respects in which there are variances between the allegations and the proof. Wherever those variations are material, the defendants should have the benefit of them. They are entitled under the law to that benefit and it will be accorded to them.

In a case of this character, as in other cases, the defendants were entitled in advance to be informed, with sufficient definiteness to enable them to defend themselves adequately, what are and what is the nature of the accusations against them. The 26 counts come up to this standard.

I shall exclude from further consideration, on the issue of guilt or innocence, the charges contained in the information that there was either a requirement or other action on the part of the
118 defendants designed to compel or effecting the employment of excess labor by marketmen; also the charges of spying. I shall so treat the charges in regard to those phases of the litigation whether they be included separately among the 26 counts as the entire basis of a count or whether they be intermingled with other allegations in the 26 counts. There is some evidence bearing on both matters. In my judgment, however, with respect to neither has there been the adequacy of proof which is required by law in order to support a conviction on those particular charges.

It is not enough to create a suspicion. It is not enough to have a preponderance of proof. No conviction can properly be based on

suspicion or on evidence which reaches only a preponderance. So also mere assertion by one affected, that the number of laborers he was called on to engage in his business was more than he needed, is not enough to establish a violation of the decree in a prosecution of contempt for violating it.

The decree is to be interpreted in the light of the law. It is likewise to be interpreted in the light of the issues made in the suit in which it was rendered. It was not the purpose of the decree, outside of the expressed prohibitions it contained, to place any restraint whatsoever upon collective bargaining which, under the law, has been the right of labor organizations and individual laborers for years. It was not the intention of the decree to go beyond the necessity, as the court conceived it and as the Supreme Court of the United States itself has now announced by affirmance of the decree, of breaking up and bringing to an end the unlawful misconduct which had been engaged in, as established at the criminal trial as well as in the injunction trial.

119 There was every effort—as is manifest on the face of the decree—to reduce to a minimum the prohibitions prescribed. But there was likewise a purpose to render an effective decree. It was the intention, so far as, in the performance of its duties under the law, the court could do it, to put an end to unlawful evil practices in the poultry industry and to bring future conduct to those who were enjoined into harmony with the laws of the United States. Despite the prohibitions, those who previously had been entitled to engage in collective bargaining, and in the other measures by which the lawful rights of laborers had been assured to them, to a great degree were left undisturbed; were left to continue collective bargaining and enjoyment of other rights. On the other hand, as already stated, the decree contains prohibitions which diminished the liberty which had theretofore existed; but these prohibitions are of a kind and go only to the extent shown by the evidence to be essential in order to bring about lawful conduct on the part of those who had been proved to be engaged in violations of the laws of the United States. The loss which resulted to those who theretofore had themselves exercised the many privileges granted to them by law in collective bargaining, or who through their cooperation had secured what they deemed to be the rights of laborers, was solely the consequence of criminal misconduct.

The prohibitions of the decree are not to be defied. Whether those prohibitions be wise or unwise, whether those prohibitions be right or wrong—and in this instance they are right, because the Supreme Court of the United States has said they are right—they are to be obeyed so long as they stand.

120 From the testimony of some of the witnesses, as well as from the nature or the implication of certain of the contentions advanced in behalf of the defendants, apparently there is, or at least may be, an impression that if there exist a contract between

a labor union and an outsider who is the employer of labor, such as a marketman, the very fact that the contract, as between the union and himself, covers a particular matter favorably to the union, exempts the delegates and members of the union from the prohibitions of the decree. Of course the statement was not put in that precise form. Nevertheless, that is the effect of the argument. I issue a caution against action upon any such assumption in future—as I endeavored to do at the time I decided the injunction suit.

There is considerable basis for suspicion of violation of the decree in regard to enforcing employment by marketmen of excessive numbers of laborers as charged in the information. Mere assent by marketmen to contracts calling for such numbers is no excuse. As I have already indicated, however, the proof does not come up to the measure required by law to warrant a conviction with respect to this phase of the controversy.

I shall now take up certain of the 26 counts of the information which I have mentioned as definitely involved—excluding from them what may be charged therein as to excess labor or spying.

To my mind the proof of guilt with respect to the use of the positions of the delegates in the sale of poultry feed, as charged in count 4, is overwhelmingly convincing. The decree made clear as to the sale of poultry feed—so denominated by name in the decree—
121 that in future there should be no use of the positions or offices of those connected with the unions for the purpose of coercing the purchase by marketmen of poultry feed from particular sellers. It would be little short of defying common sense, as I see it, to review the proof at the present trial and not to conclude from it that the use and the aim and object and intention of the use made of the union delegates, as charged in count 4 and established beyond any reasonable doubt, were prohibited by the injunction. What marketman could escape coercion, with the power in the hands of delegates associated with the Metropolitan corporation? What marketman could avoid buying from that company, from that seller of poultry feed, if he was to succeed in his business or even to continue in business? The coercion and the purpose to coerce were inherent and they are abundantly proved.

It is established by the evidence to my satisfaction beyond a reasonable doubt that the defendants Joseph Weiner and Arthur Herbert are guilty as charged in the 4th count. I am not convinced by the requisite measure of proof, however, of the guilt of Charles Herbert under count 4.

In so far as count 4 concerns the defendant Rosenstein, I shall consider it in connection with so much of count 21 as relates to the sale of poultry feed.

Under the proof the defendant Rosenstein is equally guilty with the defendants Weiner and Arthur Herbert under count 4. Rosenstein is also guilty of the charge in that portion of count 21 with
122 respect to poultry feed. The defendant Weiner and the defendant Arthur Herbert are not named in count 21.

Rosenstein knowingly participated in the prohibited use of the delegates. It is the same, so far as affects the issue of his guilt or innocence, as if he had himself been a delegate. He was the president of the corporation. He employed and associated himself with the delegates in carrying out the plan for using these delegates with the aim and intention of putting such pressure on marketmen and others engaged in the poultry business where there was occasion to employ union labor, that they dare not refuse to buy poultry feed from the Metropolitan corporation. Only, as I see it, by construing the decree to have the effect I have ascribed to it, can it be given a rational meaning or can it accomplish the purpose which was its plain intent.

Under counts 5 and 6 as to the S. S. & B. Market, in my judgment the defendant Weiner is overwhelmingly proved guilty. There is no explanation whatsoever in the credible testimony, nor on the established facts, except that the defendant Weiner either caused or participated in causing the wrecking of that market. That he did so is proved to my satisfaction beyond any reasonable doubt.

Much has been said in argument about Exhibits 132 and 133. After listening to the argument, I carefully re-read last night the pertinent testimony which should be considered in connection with those exhibits. There is nothing in them which is sufficient to create a reasonable doubt of the guilt of Joseph Weiner. So far as I can see, they may not be given the effect sought to be attributed to them by
123 his counsel. Even if, however, that effect were given to them—and I repeat that I do not think they are entitled to it—the only consequence would be to inject Mooney Siegel as an additional participant in the scheme. Under the evidence, which I cannot reject, and which I believe to be truthful, bringing in another participant would not relieve or tend to exculpate Joseph Weiner from what the testimony overwhelmingly establishes he was guilty of.

Under count 11, concerning Schechter Brothers, the defendant Frankel in my judgment is clearly guilty. It is not established to my satisfaction that he was a participant in the injection of emery into the oil or otherwise into the motor; but that he was a participant in the doing of the act charged in count 11 is established beyond a reasonable doubt in my judgment.

He is not released from responsibility for violation of the decree by not having been made a party to the injunction suit. This is true because he had knowledge of the decree at the time and he was associated and confederated with those who were parties to the litigation and is obviously within the class specifically enjoined by the decree.

There was a plain intent to break up practices of the kind described in count 11. The purpose of the decree was not merely to free the channels of industry and commerce. The purpose went far beyond that. The freeing of commerce and industry from restraint was so that the public would be benefited. We are dealing in the present instance with a portion of the public who, as I pointed out at the injunc-

tion trial, are particularly helpless and imposition on whom is peculiarly objectionable, because it takes advantage of their religious scruples.

124 The forcing of the purchase of poultry feed from particular sellers at high price—at prices higher than the marketmen could buy from other dealers in poultry feed—put an additional burden on the backs of consumers. That is a thing the decree was designed to correct.

The forcing upon marketmen of the payment of high charges for the use of coops likewise was intended to be stopped, in order to avoid the additional expense imposed on the consumer. The testimony is that one dollar per coop for a single use of the coop was charged to the shipper. The remittance to the shipper by the New York receiver or commission merchant was reduced in that entire sum on account of the single use of the coop. The marketman himself received a rebate of 35 cents upon returning the coop to its owner. The net expense of a single use of the coop paid by the marketman, therefore, was 65 cents. Whether only the 65 cents or the whole of the dollar was charged to and was eventually imposed on the back of the consumer does not appear. The inevitable result, however, is that the consumer pays at least the equivalent of 65 cents per coop for a single use, though the proof is that coops can be purchased outright for from $1.53 to $1.65 each and that each coop could be used approximately 200 times over a period of 16 months. The design of the decree was to break up a practice like that. It does not make any difference if it had existed for 20 years, as some of the testimony indicates.

As to the charges in counts 12, 13 and 16, and as to so much of count 17 as concerns interference with or refusal of loading, the evidence establishes beyond a reasonable doubt that the defendant

125 Keslin is guilty as charged. There have been prevention of and interference with loading, as well as detention of trucks which were at the market to be loaded, in the instances as charged in the information. In at least one instance there was also violence and abuse by the defendant Keslin as means of accomplishing the result. He was in control of the loading situation. He not alone participated in the misconduct, but he enforced it. As I have indicated heretofore, the existence of a contract is not a defense—although it provide that trucks of marketmen should be driven by union employees only or although, in the absence of the prohibitions in the decree, it might have been that other union men would have been free to refuse to have anything to do with trucks driven by their owners or by nonunion chauffeurs.

The decree put prohibitions on the conduct of those who were bound by the decree. Those prohibitions were obviously violated by Keslin.

The defendants, Weiner, Arthur Herbert, Rosenstein, Frankel, and Keslin, whom I have named and whose cases I have discussed so far, are found not guilty of all the charges except those of which I have found them guilty.

The three union defendants, the defendant Charles Herbert, and the defendant Aaron Weissler are acquitted of all charges.

Are you ready now to proceed with the sentences?

Mr. PERLMAN. I did not hear you mention Local 440 or Local 167.

126 The COURT. I said the three unions were found not guilty; the Orthodox Poultry Slaughterers, Local 167, and the Poultry Schoctim Union were acquitted.

I should add, in respect to some of the matters with which the acquitted defendants are charged, that there is ground for grave suspicion of their guilt in connection with certain of those matters; but the proof does not rise to the point of convincing me beyond a reasonable doubt of the guilt of any of the three unions or of Aaron Weissler or of Charles Herbert or any of the charges. They are, therefore, acquitted.

Mr. KAUFMAN. I ask your Honor to adjourn the matter of sentence for a week. I will not be here——

Mr. RICE. If your Honor please, I see no occasion for adjourning the sentencing of these defendants. This trial has lasted for five and a half weeks. The court has had an opportunity to observe these defendants, has heard several defendants on the witness stand, and I feel that there is no occasion for an investigation prior to the sentencing of these defendants.

The COURT. Let me hear Mr. Kaufman.

Mr. KAUFMAN. So that I may have an opportunity to confer with the defendants; that is all, sir.

The COURT. Denied. We will proceed to the sentences; there is no occasion for adjournment.

127 Mr. KAUFMAN. I move first in arrest of judgment and to set aside the verdict of the court on the ground that it is contrary to law and contrary to the evidence, and more especially as to the defendant Keslin, the court has given no significance to the provisions of the decree relating to subdivision D, to the language of the decree providing for the refusal to load under reasonable circumstances. There is no evidence of any refusal to load except as against marketmen who had contracts with the union, which contracts were violated by reason of the marketmen going to the market without their union chauffeurs. That the violation of the contract by the marketmen constituted a reasonable condition as is provided for in subdivision D.

The COURT. I have given consideration to that argument, to that provision of the decree, and also to other provisions of the decree. I am convinced on the facts that the decree does prescribe the conduct of the violation of which the defendant Keslin is found guilty.

Mr. KAUFMAN. If your Honor please, with respect to the defendant Weiner your Honor knows that he has been found guilty of a conspiracy charge in the State court; that he has an appeal pending in the Court of Appeals; that the matter was heard there some weeks

ago and that a decision is expected. He was sentenced to the penitentiary, which means that his sentence may be up to three years, dependent upon the regulations of the Parole Commission. It
128 is with respect to this third matter that your Honor has found him guilty of and that your Honor is about to impose sentence. That is, of course, in addition to the allegations respecting paragraph 4.

I say to your Honor that under all of the circumstances the defendant Weiner has suffered sufficiently. He is out of the chicken business for good and forever at the present time, and has been out since July of last year. He is no longer connected with the feed company, he is no longer connected as a delegate of the union. He will consent to an amendment of the original decree providing definitely and for all time that he shall not engage in the poultry business in any respect whatsoever.

I ask your Honor to take this matter into account in connection with the imposition of sentence on the defendant Joseph Weiner. I submit that if it is the purpose to rid the chicken business of Joseph Weiner it can be most effectively done by an amendment to the decree of February 6. He will consent to a prohibition against his having anything to do with any part of the poultry business, either as an employee, delegate, poultry man, feed man, or anything else.

The COURT. The purpose of a sentence is not primarily the punishment of an individual who has been found guilty of an infraction of law. The chief purpose is to deter others, as well as to deter him, from future infractions of the law, although where he is found guilty he must himself be punished for the offense he has already committed.

I would not be willing to have the decree of this court hereafter flaunted—as I believe it has been flaunted by the defendant
129 Weiner—through leniency of sentence. The punishment for violation of the decree of this Court is entirely separate from any punishment under the State law. Punishment by the State court may be inflicted only for the commission of a crime under the State law. Nevertheless, I could make a provision which would afford an opportunity for hearing after the result of the decision of the Court of Appeals is known or if that decision be followed by a trial in the State court—in event the Court of Appeals should grant a new trial; but not now.

(Addressing the defendant Weiner:) Stand up.

(The defendant Weiner stands.)

The COURT. Have you anything to say why sentence should not be passed upon you?

Defendant WEINER. No.

The COURT. The sentence of the court is that for the contempt of which he stands convicted under count 4 the defendant Weiner be imprisoned in the United States House of Detention for a period of six months; and that for the contempt of which he stands convicted under counts 5 and 6 he be imprisoned in the penitentiary for a

period of two years; service of the two years' sentence to begin when the defendant is released from the sentence that he is now serving under conviction in the State court. In so far as lawful, I should be willing to arrange in the judgment that the six months' sentence shall run concurrently with the two-year sentence. Upon that question the parties may be heard. The term of the court will be
130 extended as to the defendant Weiner until thirty days after the decision of the Court of Appeals in his case there pending, during which thirty days' period after the decision he may be heard, upon notice to Mr. Rice and to the United States Attorney with respect to some modification of the arrangement requested by his counsel.

Arthur Herbert.

(The defendant Arthur Herbert stands.)

The COURT. Have you anything to say?

Defendant ARTHUR HERBERT. No, sir.

The COURT. The sentence of the court is that the defendant Arthur Herbert be imprisoned for six months in the United States House of Detention.

The defendant Rosenstein.

(The defendant Sidney Rosenstein stands.)

The COURT. Have you anything to say?

Defendant ROSENSTEIN. No, sir.

The COURT. The sentence is that you be imprisoned for six months in the United States House of Detention.

The defendant Frankel.

(The defendant Harry Frankel stands.)

The COURT. Have you anything to say?

Defendant FRANKEL. Your Honor, I would like to say a few words if I am permitted. I am the father of four children;
131 I was driving a truck all of my life. I really do not know anything about this, your Honor. I wish you would take that into consideration.

The COURT. I have considered the testimony. The sentence of the defendant Frankel is that he be imprisoned for three months in the United States House of Detention.

The defendant Keslin.

(The defendant Max Keslin stands.)

The COURT. Have you anything to say?

(No response.)

The COURT. The sentence of the defendant Keslin is three months in the United States House of Detention.

The defendant Weiner is already in charge of the State authorities.

The defendant Rosenstein is ill. I stay the execution of the sentence of the defendant Rosenstein for two weeks and his bond is continued in the meantime, with leave, in the event that his health be not recovered by that time, to make application, upon notice to Mr. Rice, for a further extension.

Mr. KAUFMAN. May I ask your Honor to grant a general stay to all defendants pending appeal, and that the execution of the sentences be stayed until after appeal?

The COURT. Motion denied. Follow the usual practice. There is no such thing in the existing practice of this court.

132 Mr. KAUFMAN. I ask your Honor to stay the execution until an application may be made to the Circuit Court of Appeals for a stay pending appeal.

The COURT. Denied. You can make your application to the Circuit Court of Appeals.

Mr. KAUFMAN. If your Honor please, the Jewish holidays start, as I understand it, tomorrow. These defendants have been out on bail for a long time, and there is no question about their return. Application can be made to the Court of Appeals by Tuesday or Wednesday of next week. The application will be promptly and diligently made, May I ask your Honor to grant us a stay until a week from Saturday?

The COURT. Motion denied. There is no such practice; no such thing as a stay pending application to the Circuit Court of Appeals. You may apply to that court; but there should be no stay until such application is presented, unless first I can find what is equivalent to the duty on the part of this court to grant a certificate of reasonable doubt. You have pointed out no basis for such a certificate and I do not think there is any.

Mr. PERLMAN. I do not want to add anything to what Mr. Kaufman says, but perhaps I am more familiar with this than Mr. Kaufman. Tomorrow night and Saturday night are the two nights of the year that all Jews are home with their families celebrating the Feast of Passover. While it goes on for the whole week,

133 I think there are few orthodox or reform Jews who do not observe that. I just wondered whether your Honor might not feel that these men might be with their families. They are all on bail. It does seem to me that they might be able to be home on Friday night and Saturday night, which are the two important nights. I thought that your Honor might let them go home.

The COURT. You are asking for a stay until Monday?

Mr. PERLMAN. Yes.

Mr. RICE. I object, if your Honor please, I do not believe that the defendants——

The COURT. They are not entitled to it; but I am going to give it to them. They are not entitled to it of right.

Mr. RICE. May I say one word?

The COURT. Yes.

Mr. RICE. I do not believe that the men that have been sentenced here are the type of men that will have any occasion to celebrate the Jewish feasts.

The COURT. I do not inquire particularly into people's religions. Every man is entitled to his own religion. I respect everybody's religion.

134 In the cases of Arthur Herbert, Frankel and Keslin make a note: Stay of execution and their present bonds continued to April 2.

FRANCIS G. CAFFEY,
United States District Judge.

Dated March 29, 1934.
Filed: April 4, 1934.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 15th day of May, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the One Hundred and Fifty-ninth.

[SEAL] CHARLES WEINER, *Clerk.*

135 *Exhibit No. 11 to response*

United States District Court, Southern District of New York

In Equity. No. 52/30

UNITED STATES OF AMERICA, PETITIONER,

vs.

GREATER NEW YORK LIVE POULTRY CHAMBER OF COMMERCE ET AL., *DEFENDANTS*

Before Hon. Francis G. Caffey, District Judge

George Z. Medalie, United States Attorney, Solicitor for Petitioner. Walter L. Rice and Albert J. Law, Special Assistants to the Attorney General, Counsel.

Goldstein & Goldstein, and Joseph F. Kroppy, Solicitors for certain defendants. Joseph F. Kroppy, Counsel.

136 Kaufman & Weitzner, Solicitors for certain defendants. Samuel H. Kaufman, Counsel.

Sol H. Eisler, Solicitor and Counsel for defendant, Arthur Herbert.

Blau, Perlman & Polakoff, Solicitors for defendant Joseph Roseman, Secretary of the Official Orthodox Poultry Slaughterers' of America, Inc. Nathan D. Perlman, Counsel.

The COURT (orally): Five major questions have been discussed by counsel. I shall deal with all of these in time. I refer to them not only by topics, without any effort at the moment to define precisely what they are. The topics are: (1) jurisdiction; (2) conspiracy; (3) continuance; (4) parties; (5) remedy.

As I explained to counsel at or near the commencement of this trial, it is essential, in the course of attempting to perform the duties of a judge in this court, to dispose of cases promptly. Otherwise a judge is left handicapped in performing his duties in other cases or in other parts of the court. In thus immediately after the close of a trial framing a statement of the reasons which actuate the court in reaching conclusions or in determining what should be done, necessarily I shall be somewhat discursive. In addition, this
137 method unavoidably results sometimes in overlooking details.

Nevertheless—particularly in cases like this, where credibility of witnesses cuts a very large figure—the court feels that it is much more apt to do justice by acting promptly while the impressions of the witnesses are fresh. It is impracticable, if there be long reservation of decision, to get from the stenographic minutes a picture of a witness in many of the aspects which bear upon credibility. It is impossible for a considerable period to carry in mind those impressions gained during the course of the trial by observation of the manner of a witness, his demeanor in testifying and the other elements with which lawyers are familiar. Those things must be taken into account if there is to be a fair appraisement of the value of the testimony given by the witnesses.

Before taking up any of the topics which counsel have discussed, or determining any of the issues necessarily raised by the pleadings and proof so fully discussed by counsel, some background should be recited. It is only in view of that background that a proper determination can be made.

The Sherman Act deals with conditions or situations. It is designed, within the scope of Federal law, to preserve a free market; within that sphere to bring about competition and to prevent undue restraints of trade or commerce. These things are to be remembered in interpreting the facts. Particularly is it to be remembered that the statute deals with conditions or situations; also that its intent is to benefit not alone those engaged in business, but the public ultimately affected as well.

138 Whether the policy as to a free market, whether the policy as to competition, whether the policy as to preventing restraints, or whether the policy of condemning combinations, be wise or unwise economically, is not for the court to say. The Congress has expressed its will. It is the function of the court only to ascertain that will and, in the light of the proven facts, to give it effect, whatever may be the consequences. If the law be unwise, the remedy under our form of government is to go to Congress, which makes the law or changes the law. So long as the statute continues, it is the duty of citizens to obey it and the courts to enforce it.

There are other circumstances which must be taken into account. In this case, Louis Cohen and Max Sokoloff having died before commencement of the trial, there are 101 defendants. Of the 101 remaining, 52 have not opposed a decree for the Government. Of the 49 resisting such a decree, one is a corporation and two are associations. Both the corporation and the associations have been convicted—convicted on an indictment substantially identical in its phraseology with the first twenty-three paragraphs of the amended petition, which paragraphs contain the essential features of the charges in this case. Of the individual defendants who are resisting, twenty-nine have been convicted in the same way. There are thus left 17 unconvicted individual defendants who are resisting.

The Government has called 86 witnesses, the defendants have called 30—a total of 116 witnesses.

The Government has included among its 86 witnesses eight defendants. The Government has sought out of the mouths of eight
139 defendants to procure evidence in support of the allegations of the petition. Of the eight defendants who testified at the instance of the Government, three have consented to a decree. These are Louis Weidberg, Aaron Steinberg, and Jacob Mast. Of those who are actually resisting a decree, only three of the defendants have been called by the Government. These are David Hirshon, Morris Bloom and Morris Chast.

In addition, the Government has called the defendant Samuel Goldstein. While formally he is resisting a decree, as we shall see later, he is doing so merely formally. The Government called Max Keslin, but he testified to nothing material. He may, therefore, be eliminated from consideration for the purpose of this classification.

The defendants called three of their own number as witnesses. These are Morris Gerber, Joseph Scull, and Abraham Harrison. Two of them (Gerber and Scull) were convicted in the criminal case; Harrison was not a party to that case. All three have consented to a decree for the Government in this case.

Omitting Samuel Goldstein and Max Keslin from the eleven defendants called as witnesses, it thus appears that six of the nine called by both sides consented to a decree and that only three, namely, David Hirshon, Morris Bloom, and Morris Chast, are actually resisting a decree.

There is another fact in the light of which this case is to be considered; omitting Max Keslin, who really testified to nothing, and omitting what was embodied in Exhibit A—to which I shall refer hereafter—not a defendant connected with either union took
140 the stand. Jacob Goldwasser, a Schochet, was called as a witness on a relatively inconsequential matter and perhaps one or two of the witnesses called by the Government are now or have been connected with the Truckmen's Union; but outside of those, no member of either union testified. The failures in this respect bring into operation certain rules at law, which will be discussed later.

Next, the law as to the main aspects of this case has been settled—settled by the Circuit Court of Appeals for this circuit—and I am, of course, bound to follow it. The law on another aspect of the case has been settled by the decision of Judge Woolsey, who ruled on the effect in this case of the conviction so far as concerns those defendants who were convicted. The sufficiency of the amended petition has been sustained by Judge Grubb. That also binds me.

It is rare that a case comes up for consideration which has previously to so great an extent been before the court as have been matters involved in the case on trial. There has been a jury verdict. This verdict was on issues of fact identical with issues in the case at bar. To a great extent the verdict rests on testimony identical or substantially identical with that brought before this court. Five judges sitting in this court have previously considered one or another of the aspects of the case on trial.

All these preliminary features which I have mentioned must necessarily be taken into account in reaching a conclusion at the present trial.

Turning now to the first topic, of jurisdiction: there is no question for me to decide.

141 The testimony of Frankel and Hawk, which constitutes the description of the material facts upon which the issue of jurisdiction turns, was before the Court of Appeals on the appeal from the criminal conviction. That testimony is the governing testimony on that issue here. In only one immaterial respect has there been any change from that testimony. That was by the witness Tabor. According to him, there is some slight change in the percentage of poultry handled by express. According to his statement, confirming statements of Frankel and Hawk, a vast part of the traffic in poultry now involved moves in interstate commerce. It is handled, as shown by the proof on the present trial, precisely as was shown in the criminal trial. The Court of Appeals has, therefore, settled that such commerce is within the jurisdiction of this court.

Considered even, however, as a fresh question, I am convinced, after listening to the arguments presented here, after listening to all the proofs, after examining the briefs, that this is a case clearly within the jurisdiction of the court. The evidence establishes beyond peradventure that we are dealing with a single situation. The intrastate and interstate portions of that single situation are so intertwined that it is impossible to separate them in the way which counsel has argued they should be separated for the purposes of jurisdiction. They are interrelated and are parts of a single business. Whatever be the intrastate features—precisely as the Supreme Court has settled with respect to railroad rates and the structures of rates for intra and interstate commerce in commodities where there exists this intertwining, each interdependent—the Federal law

142 is paramount. It is manifest from listening to the testimony that without the inclusion of both the intrastate commerce

and the interstate commerce, the scheme which the proof establishes would have been unable to operate.

Without dealing with the business in the way in which it was handled at the terminals in New Jersey, without dealing with poultry purchases in other cities, in other cities outside of New York State, without dealing with the transportation of poultry from the New Jersey terminals to West Washington Market or to other places of business of those engaged in the poultry industry within the City of New York, the scheme as it was designed, and as was proved in this case, would have been wholly ineffective. The interference with the interstate feature was not merely incidental. As I have said, the interstate and the intrastate parts of this business were and are interlocked. The two aspects of it constituted and still constitute a single situation. In consequence, it comes clearly, as I view it, within the jurisdiction of this court under the terms of the Sherman Act.

Gentlemen, we may just as well face the facts as to the purpose of this scheme, as it is established by the jury verdict. It was to get and to maintain a stranglehold on this situation, a stranglehold on the interstate features as well as on the intrastate features. Without the stranglehold on the interstate features, the intrastate phase of it would have failed. Somebody behind the devising of the plan had the brains to see that and the abandonment now of interference with the interstate feature of it would render futile any effort to control the local or intrastate feature.

143 I hold therefore that this court has jurisdiction.' What about conspiracy?

Judge Swan, in the opinion of the Circuit Court of Appeals, has truly and accurately described the essential features of the conspiracy as charged in the petition. It would be supererogation for me to enter upon a further description. The verdict of the jury established the existence of that conspiracy. Judge Woolsey struck out the denials by the convicted defendants of the conspiracy. His opinion binds me. It therefor follows, for the purposes of this case that to an extent the conspiracy is already established beyond the possibility of my making an effective finding to the contrary.

What is a conspiracy? Is it necessary in order to establish one that it be shown that the parties sat down together and made an explicit or definite agreement upon all phases of it? Must it be shown to have been expressed in writing or even orally? Not at all. It may be implied. It need not be expressed; it may consist of acts with a common design of concert or of cooperation between the conspirators for the purpose of effecting the object of that design.

Again is it necessary that all who join do so voluntarily? Not at all. Some may join involuntarily. Cooperation may be enforced. Nevertheless if for the purpose of effecting the common design there be the requisite concert the conspiracy is shown. It is provable by circumstances; it is provable by events. It may be established by

implication. It may be shown by inferences, if there is a proper basis.

Here, as already indicated, taking up the matter as one of
144 first impression, we are very much dependent upon the credibility of witnesses; but also it is not to be overlooked that one of the principal facts is the silence of those who are charged in the petition.

Gentlemen, I conclude that if there had never been a jury verdict, the evidence in this case independently establishes the conspiracy which is alleged in the amended petition.

There were three groups—the two unions and the market men. It matters not whether from time to time the form in which those groups organized themselves may or may not have changed. It matters not if from time to time the personnel of those whose activities are disclosed may or may not have shifted. The proof is that, running through the whole period, both within the unions and without the unions, since 1928 as well as in 1927 and 1928, a great proportion of the individuals have been the same. The charge in the petition is that the unions were the backbone of the conspiracy. I don't think that all the market men were animated by the purest of motives; far from it. But, nevertheless, I am persuaded by the proof that many of them were victims. Indeed, I think it is clearly established that the unions were the backbone of the conspiracy and that many of the market men joined in what they conceived to be self-defense. In a limited sense at least, therefore, they were victims, I shall comment later upon the proper place under the law of the unions; but here, at the stage of the case with which we are now concerned, it is pertinent to say that the unions failed to confine themselves to their field of legitimate operation. They interfered with purchases and even with sales. They did not
145 confine themselves to the local part of the industry. Even yet, as the proof stands, one of the unions is entitled to pay for the transportation of poultry from the New Jersey terminals to New York, though it never carry it. According to the proof, if a market man goes with his own truck and himself transports poultry, he must nevertheless ultimately pay for the transportation. The charge for it goes to the Teamsters' Union under the proof.

Gentlemen, there is one feature of this case which is fatal, as I conceive it, to any contention that there was not a conspiracy or that the unions did not share in the great responsibility for it; and that feature is the concurrence, shown by the proof so frequently of the enforcement by the unions of their rules whenever market men or butchers became recalcitrant. That feature is astounding. Further, it is established by the proof, and undenied, that there was sabotage in shops or markets where the Shochtim were employed and that the Shochtim there were loafing on the job. The inference is inescapable that those devices of sabotage and loafing were employed in order to compel those who were against the conspiracy to live and

act within its purposes. False reasons were assigned as excuses for enforcing union rules. Accordingly, I can but conclude that the backbone of the conspiracy was the unions.

In the face of the amazing and grave accusations, set out on the face of the petition, the defendants sat silent; they did not deny them except by formal pleading.

They are here in court, they have been here from both unions almost daily throughout this trial, they have been active in it, they have participated with counsel in its conduct; yet they have
146 not taken the stand to testify in rebuttal of the proof given by other witnesses.

The conspiracy is established by the dovetailing in with each other of numerous established scattered events, from which the inference of conspiracy is inescapable.

As I said before, the Sherman Act deals with conditions. The conspiracy to restrain trade as a device for accomplishing ulterior and illegitimate purposes is shown. One of the essentials of the conspiracy, its very essense in fact, was unreasonable—indeed, outrageous—restraint of interstate trade.

As I have indicated in reference to the jurisdictional question in this case, so in respect to the question of conspiracy, the defendants have taken a stranglehold upon an industry. That stranglehold upon the poultry industry was accomplished only by maintaining a stranglehold upon interstate as well as upon intrastate commerce in this market.

Next, what about continuance?

I think counsel agree that it is enough if it be established that there is threat or danger of continuance of resumption of the operations of a conspiracy, if it be once established, and that, under the decisions of the Supreme Court, if that be shown this court may, and in proper circumstances ought to, issue an injunction.

The original petition was filed February 7, 1930; the amended petition, April 17, 1930. The date of filing the original petition is the test; but it becomes immaterial to pass on the matter so far as concerns the one date or the other.

147 The amended petition charges essentially that there was threat or danger of the continuation or resumption of the conspiracy. I am not sure but that, on proper interpretation, it also charges that the conspiracy still continues. I concur entirely with the ruling of Judge Mack as to the insufficiency of the original petition, because of the form of the allegations—the vague form of the allegations.

Gentlemen, the three groups described in the petition exist today. Mere changes in form of the market men from one type of organization to another are utterly immaterial. The personnel is about the same. The two unions are identical. Any change in their membership may be ignored.

The Supreme Court has over and over again said that where it has been established that people have engaged in a conspiracy like

this, then, in the eyes of the law, they are not to be trusted. The proof might be merely of sporadic occurrences in furtherance of the purposes of the conspiracy since what was covered by the jury verdict; and there is at least proof, ample proof—it is undenied—of sporadic occurrences since the verdict which constitute the same type of practices that were commented on by the Circuit Court of Appeals and that constitute outstanding and characteristic features of the original conspiracy. I say again the Sherman Act deals with conditions. We are not confined to names. So that, I am inclined to feel that, even if there were not more in this case than what I have already discussed on the phase of continuance, it would be quite sufficient to warrant an injunction.

148 But, on the law of the case the matter is stronger for the Government. A great chancellor of the State of New York many years ago in the famous case of Bogardus v. Trinity Church, 4th Sandford Chancery, used this language:

"It is a rule of evidence, founded on the experience of human affairs, that where a state of things is once established by proof, the law presumes that such a state of things continues until the contrary is shown or a different presumption is raised from the nature of the subject in question."

As I have already said, I agree that Judge Mack's ruling was correct as to the insufficiency of the original petition. I think it was essential for the Government to incorporate the additional allegations of the amended petition bearing upon continuance or bearing upon threats. That, however, were merely as to the pleading. The Government, having established, as the jury verdict had established, the existence of the conspiracy, it would have been entitled to a decree if it had not gone a step further; if it had not put in any evidence additional to what was shown by the proof of and was embodied in the jury verdict.

So far as concerns those who were convicted in the criminal case, it would seem a matter of common sense, and I believe it to be the law, that, in order to avoid an injunction, it was the duty of the convicted defendants to purge themselves in this case. Charged as they were in this petition already convicted, yet they remained silent as to their conduct since the verdict. They contented themselves with keeping the facts within their own breasts. At-

149 tending court daily and consulting actively with their lawyers, from their very faces indicating that they are intelligent, advised by skillful counsel, they remained silent as to the charges. What is the result?

The answer is given by Mr. Justice Brandeis in Bilokumsky v. Tod, 263 U. S.:

"Silence is often evidence of the most persuasive character."

So it is in this case; emphatically so.

The facts were peculiarly within the knowledge of the defendants, who listened as humble people poured into my ears from day to day details of the oppression they had suffered. These witnesses charged

the defendants by testimony given from the stand, charged into the very ears of the defendants as they sat in this court, and yet the defendants remained mute.

The inevitable inference, under the circumstances, is that if the defendants had taken the stand they would have been compelled to admit that they were still engaged in the conspiracy which had already been established by the jury verdict.

Not alone does the rule apply to the convicted individual defendants; it applies to the unions as well. The delegates of the unions were in court and failed to testify. Of a similar situation, in Mammoth Oil Company v. United States, 275 U. S., where the officer of a corporation was available in a suit against the corporation in which serious charges had been made and he failed to take the stand, Mr. Justice Butler, applying the same rule said:

"His silence makes strongly against the company."

150 The rule I have mentioned does not mean of course, that there can be recovery without proof, but it is of the greatest consequence in measuring the value of proof. There is ample evidence here from which it can be inferred, even though the misconduct of defendants had been sporadic only, that it was animated by the same purposes and that it arose from or was in furtherance of the same conspiracy that had already been condemned in the criminal case.

Suppose, however, I be in error on either of the points I have just discussed. I think the proof establishes satisfactorily not only threat of continuance but existence as well of conspiracy after suit was brought. The Government would be entitled to a decree on this phase of the case on the testimony of Aaron Steinberg alone.

If only Steinberg had testified, what he said would be enough to sustain, and, indeed, to require, an injunction.

I listened to him carefully. In my judgment, he told the truth. Doubts are sought to be cast on him, but he was abundantly corroborated.

It was argued so confidently in this case that Judge Knox took a different view of Steinberg in the probation hearings that I felt I should consult him. While I assume full responsibility for the disposition of this case, I think counsel are entitled to know what Judge Knox thought of Steinberg, and he has authorized me to say that he believed, as I believe, that Steinberg was telling the truth.

Gentleman, Exhibit A convinces me, and I have read it with
151 care. It convinces me that the results of the criminal trial taught the defendants nothing. The sentences were lenient. Some of them had been served. Under the guise of a claim of having a union controversy with Steinberg, the unions resumed—and market men participated in—every essential feature of the conspiracy, of which they had just been convicted, including direct and most barefaced interference by representatives of the unions themselves with interstate commerce.

It is not easy from reading the deposition to get confidence in the impression one may gain as to the truth or falsity of a witness. Nevertheless, as I read the deposition of Wood at the probation hearings, I could but doubt the truthfulness of his statements. Before the deposition was finished I found that Judge Knox did not believe him. So also Harry Schomer, one of the union delegates, took the stand at the hearings. Judge Knox did not believe him. He was evading and finally admitted what he had denied. His own counsel had to urge him to tell the truth.

I think that any other fairminded judge would have given lenient sentences in the criminal case. He would have done it for this reason, if no other: The Sherman Act had been in existence for forty years. Many people of high stations in life, people of large financial resources, had been accused of violating the statute. Some had been convicted. Few, if any, had gone to jail. The layman might have gotten the idea, from previous events, that he could safely disregard the provisions of the Sherman Act. When these men involved in the criminal trial were convicted, they may have been under that impression. By comparison with those who had either es-
152 caped conviction or, if they had been convicted, had not served jail sentences, the poultry case defendants were relatively unimportant. So, despite their conviction, it seemed wise to temper their sentences; but the action of the court was misinterpreted.

What happened between February and May of 1930, in connection with the Steinberg incident, came before Judge Knox first on May 13, 1930. I know why he disposed of it as he did. It was presented in a collateral way. Some of the most blameworthy people in the incident were not involved in the criminal case and hence could not be dealt with in the probation proceeding. The matter having been exposed and a warning having been given by the court, it was hoped that this would be enough. The mild disposition of it, however, does not in the slightest impair the force of the evidence taken before Judge Knox, and set out in Exhibit A, to establish the Government's contention that, even after the filing of the petition now under consideration, there was threat or danger of resumption or of continuance of the conspiracy or, as I believe, to establish that the conspiracy then still persisted.

I have great respect for the feeling of counsel as to the Steinberg incident, as expressed by him yesterday. I do not doubt in the slightest the sincerity of counsel in taking a view of Steinberg directly opposed to that taken by Judge Knox and by myself.

Steinberg is a ruined man. Perhaps he has bias. He has been driven out of the industry, but I was rather surprised at the temperateness with which he testified. I think he told the truth. As I have said, he was corroborated by the testimony at the hearing
153 before Judge Knox. He was corroborated as to the use of violence, as to the destruction of his property, as to the interferences, with his making purchases, as to the participation in those interferences by the union delegates themselves, and as to the frustra-

tion by the interferences with his purchases in interstate commerce. He was further corroborated by other circumstances that have been brought out in evidence at the present trial.

As I have heretofore indicated, the proof shows a condition of things whereby the kind of thing that happened to Steinberg can be resumed at any moment—even though the unions have gone somewhat under cover up to this time, during the pendency of this litigation.

The proof, as it now stands, is that the Teamsters' Union still have a participation in the returns from transportation of poultry from the New Jersey terminals, absolutely, Mr. Kaufman.

Mr. KAUFMAN. Your Honor, I made a note of that——

The COURT. Absolutely, and I put the question again when the testimony was being brought out.

Mr. KAUFMAN. There is no foundation for that.

The COURT. It was so testified.

Mr. KAUFMAN. I have the record clear on that point, but that is not a fact, and I am sure the record here does not show it.

154 The COURT. That is the testimony in this case, even where the market men themselves in their own trucks transported——

Mr. KAUFMAN. Isn't your Honor confusing the union with the New Jersey Live Poultry Company?

The COURT. I think not. I will verify it and shall be glad to correct it if I be shown to be in error (see stenographic minutes, pp. 1373–5, 1381–5).

Mr. RICE. May I state, your Honor, that the members of Local 167 do work for the New York Live Poultry Trucking Company and that the benefits derived by the New York Live Poultry Trucking Company necessarily go to the union?

Mr. KAUFMAN. You are wrong about that.

The COURT. The proof is left where it is open absolutely to that inference.

The Shochtim are still in a position to resume their interferences with the slaughtering markets and employment of the same devices that the proof shows—without being denied by them—that have been resorted to heretofore.

Other organizations have grown up from time to time; the L. W. Credit Association, the Live Poultry Dealers' Protective Association, the Live Poultry Slaughter House Association, and numerous

155 like groups. The complaints of oppression persist. They come from these humble people—many of them.

In the state of the proof as to 1931 prices, I should be unwilling to reach a firm conclusion without reserving decision and going over the matter more carefully. Numerous documents were put in evidence. Some I have seen; some I have not. I think, however, that it is not necessary to decide the principal issue made by the parties as to poultry prices during the present year. I am persuaded by some of the proof—regardless of all the things presented by the

bookkeepers—that there have been a good many raises in prices during 1931, but how general those were I cannot say.

Many witnesses engaged in the poultry business in New York City stated that they had been less interfered with than in 1927–8, or that they had not been interfered with at all since 1928. I have no doubt that is true. On the other hand, it is plain that there have been numerous interferences since 1928 and that these have been of the same type and have been enforced by the same means as were disclosed and condemned by the verdict in the criminal trial. The Steinberg incident is merely a single example.

At best, I think it can only be said that the conspirators are temporarily under cover or that the conspiracy is temporarily smoldering. That is enough in itself to afford basis for an injunction.

I recognize that there are evils in the industry. I do not consider all the butchers or poultry dealers as angels or as free from blame; quite the contrary. Certainly, they are engaged in the eco-
156 nomic struggle; they are grasping for what they can get. There is no reason why either the market men or the unions should be handicapped in controversies with them. But there are ways of meeting opponents, which are in harmony with the law; lawful methods are open to the defendants. There is no excuse for their resorting to violence in combating efforts by butchers or by poultry dealers, or by anybody else, to get an advantage.

Remember, gentlemen, that the Sherman law deals with situations and with conditions. The very history of the whole poultry controversy, as brought out in evidence, shows that there is danger of resumption of the conspiracy even if it had gone entirely out of existence.

Next, who are the parties to this conspiracy? Against whom should the decree run?

That the decree should include all the convicted defendants results from what I have already said. Of the seventeen unconvicted defendants, so far as I can recall, only Samuel Goldstein took the stand. He made no real effort to exculpate himself from the charge. Samuel Goldstein is uneducated, but he is honest, and he convicted himself of being a party of the conspiracy by his own testimony. None of the others of the seventeen took the stand. Not only is the court entitled, but it is the court's duty, to indulge the presumption, warranted by law, arising from failure to testify. This does not mean that defendants can be connected without proof. Not at all. There must be proof; but, if there be proof and they fail to deny it, in reaching a conclusion the court is justified in taking into account the affirmative proof plus silence.

157 In my judgment, the proof is wholly insufficient to establish that Jacob Damsky was a party to the conspiracy. There was proof as to his partner Morris Damsky, but there is not enough to support a decree against Jacob Damsky. The petition will be dismissed as to him.

In the same way, in my judgment, the proof is wholly insufficient to sustain a decree against Samuel Silverman. The proof, which he left undenied, is as to his cheating Lillie Horowitz. That is the essential feature of her testimony as to him. He therefore is entitled to have the petition dismissed and it will be dismissed as against him.

Of the unconvicted defendants, the one whose case has given me most trouble is Joseph Rosenman. I have gone over the testimony as to him a number of times.

My attention was not called until yesterday, when I examined Exhibit 21 myself, to a fact which appears therein. It contains a list of disbursements by the L. W. Credit Association in 1929. These include numerous payments over a period of more than two months to the Shochtim Union; but it has not been pointed out to me that there are also recited among the disbursements numerous payments to Rosenman individually. These have not been discussed by counsel and I should therefore be unwilling to give them weight in reaching a conclusion as to Rosenman. Whether the recipient of the money was the defendant Rosenman or was someone else, there the fact stands and stands unexplained. As neither counsel has commented on it, I think it would be unfair for me to take it into account,
158 and I shall not take it into account in reaching a conclusion.

After long consideration, however, on other evidence I have concluded that the Government is entitled to a decree against Rosenman.

There is the testimony about his talk with Benjamin Simon; the showing that he referred business men to Simon when they came to see him on the subject of employing Shochtim in their markets. Then there is Rothchild's testimony. Rosenman sat here throughout the trial, as he is setting in court now, and did not take the stand. Silence plus the evidence against him convinces me that it is my duty to award a decree against Rosenman.

In that connection, I may say also that, as it appears that is an officer of one of the unions, I think it proper for me to direct his attention to two things. First, the rule in the Federal Court as to injunctions is not the same as in the State court. In the State court there can be no punishment for contempt, as I understand the law, until after there has been served on the party enjoined the original or a certified copy of the injunction order. Not so with this court. One may get his information as to the existence of an injunction from reading about it in a newspaper, and in the Federal court, if he thus know about it, he may be punished for contempt if he disobey it. The other thing is this: As I understand the law—at least counsel for Rosenman and others should investigate whether it is the law—an injunction, even if addressed only to a corporation, subjects officers of and others connected with the corporation to punishment for contempt if the injunction be disobeyed. I tak it that it is at least a serious question whether or not the same rule may

159 not obtain as to officers, or perhaps even as to members, of an association.

The proof satisfactorily establishes that all the other fourteen individual defendants, who were not convicted in the criminal case, were parties to the conspiracy, as alleged in the amended petition. There should therefore be a decree against all defendants convicted and unconvicted, except Damsky and Silverman.

Gentlemen, unions, labor unions, organizations of unions are favored in the law. Nevertheless, unions are bound by the law as much as non-unions. The law encourages means of giving to laboring men the opportunity of collective bargaining; that they may improve their hours, their wages, their working conditions. The decisions of the New York Court of Appeals, which have been read in argument by counsel here, are in precise accord with what has been established as Federal law on the subject. There is no difference about the law; the question is whether the defendants have conducted themselves in harmony with the law. They are not entitled to the superior advantages given to unions or to union men by the law, unless they be and remain within the law. They are amply armed with legitimate methods to enforce collective bargaining, to improve their hours and their wages and their conditions; but, as I have indicated, they as well as non-union men are subject to other laws. They have forfeited the confidence of the court in that respect by their disobedience of the law; by the very disobedience of which they have been convicted by a jury. In the language of the Supreme Court of the United States they come within the class who are no longer to be trusted.

160 It is established by the proof—undenied by them; they do not even take the stand to deny—that the unions and their members have committed or engaged in practices, under the false guise of enforcing union rules, for the purpose of maintaining and sustaining the conspiracy described in the petition. It is established by the proof—they do not deny—that they interfered with a free market, with buying and with selling. This indisputably was something that was wholly without the realm of their own business and without the realm of anything legitimately incidental to the enforcement of union rules.

The unions were quite right or within their rights in living up to, as well as in enforcing, union rules and union contracts; not so when they trespassed on the outside of that field in an attempt to control buying and selling. The whole dominant purpose of the Sherman Act was to create a free market, to leave competition free sway, and to avoid undue restraints on interstate commerce; and yet the defendants who belong to unions joined hands in the conspiracy to prevent those very things, and when testimony to that effect was given here from the stand, they sat silent, without a word in their own defense by the way of proof.

Gentlemen, there is another feature of this case that has given me great concern. The proof is quite insufficient to enable the court to reach any confident conclusion about it.

From the state in which the proof is left, there is inescapable the suspicion that Benjamin Simon was nothing but a nefarious grafter,
and that, while distributing the graft, he was misleading the
161 gullible and the ignorant with the impression, which he sought
to create upon their minds, that he had to buy public officials. There is no proof, and I do not believe for a moment that there was corruption in the office of the State Attorney General on that subject.

What is worse than all, however—and I call it to the attention of the unions; I would not do them injustice—is that the proof rather indicates that a part of the graft collected by Simon went to the unions or to their delegates. There was no occasion for any such payments to be made as the evidence shows were made to the unions or to their delegates out of the moneys collected from the market men. Those concerned made a pretense only, so far as this matter is concerned, of having justification for making such payments.

I trust that all the unions and all the delegates of the unions are innocent. I do not convict them of participation in graft, but engaged as I am in an effort to administer the law, when an occurrence like that just discussed has come out in the evidence, I should feel that I had failed in the discharge of my duty if I did not call it to their attention.

This is not one of those cases in which, without opportunity for a jury trial, a conclusion adverse to the contention of a labor union has been reached. Both unions have had a trial before a jury. That jury convicted them. The unions come before me after that conviction; also after having had hearings before five other judges in this court, on phases of this case that have been considered by them—
and before me they sit silent. They do not purge them-
162 selves. They listen to many tales of oppression, with not a
word in their own defense.

I have said that a good deal in this case depends on credibility of witnesses. I have already indicated the significance of failure to take the stand—particularly of those personally present in court—and of failure also to bring into court persons who were available and who were the subjects of charges made from the stand. Disregarding such failures, there are 116 persons who actually were witnesses for one side or the other. I am not going to comment on all of them. I shall comment, however, on some by name, who are illustrative of the several groups.

A good deal of the testimony was taken by deposition. One cannot get from a deposition an impression as adequate for testing credibility as from listening, looking, observing, manners and considering exhibitions of bias. All of us have bias; none of us is entirely free from it. That is no objection; a man may be truthful, and yet have his own feelings or what we call bias. It is part of the function and

duty of the court to take all those things into account and to reach a conclusion as to the value or weight of the testimony of every witness.

There is also at times the very disagreeable duty of determining that a man is untruthful and of wholly rejecting his testimony. Several people have testified in this case in such way, and have deported themselves in such way that, in my judgment, their testimony was plainly untruthful. There are only two of those whom I am going to mention. I feel it proper to give their names, because their cases were so gross and I feel so confident of the conclu-
163 sion that they intentionally failed to be frank or fair in their statements. Those two witnesses are Louis Aronin and Abe Rosenberg. I do not believe either of them.

The Government was forced to call certain witnesses and there are three who were adverse and evasive: David Hirshon, Louis Weidberg, and Winkel—the last named less marked than either Hirshon or Weidberg.

One witness impressed me as being frightened—he was ignorant and uneducated—that is Harry Goldman. There was conflict about certain phases of his testimony, but I think he told the truth about having to go to other cities to make purchases of poultry. I think he and Lieb are substantially correct about the controversy which forced him to go to western cities in order to purchase. Goldman, I think, also told the truth about his experiences in West Washington Market.

I have already discussed Aaron Steinberg.

Jacob Miller is an explosive, extremely biased person. The whole evidence as to the rise of prices in 1931 has been insufficiently presented to me to enable me to reach a confident conclusion concerning it without having to reserve decision and go over the documents. It is undoubtedly true, however, that in the case of Miller, there grew up the evil practice of rebates. That is established without dispute. However, we may disregard Miller's testimony. It is not necessary in order to decide this case. He, along with two other witnesses, was overanxious in this case to convict the defendants. I take that into account in measuring his and their testimony.

164 The other two witnesses, who come within the class of biased and over-anxious, are Mack Harnett and Barney Hecht. Nevertheless, I think that for the most part what Mack Hartnett said is the truth. When I first heard his cross examination and there appeared to be some material conflicts with what he had testified at the criminal trial, I was seriously impressed that he may not have been telling the truth. I have carefully reexamined all his testimony, however, and I am not convinced that there was an intentional untruth in that variation. It is the kind of thing which experience shows may result from different methods, after the lapse of time, of examination or cross examination of a witness. On the material parts of his testimony I think Mack Harnett told the truth.

Barney Hecht is so scatterbrained that I would not predicate any decree on his testimony—although I think a great deal of what he

said was the truth. Moreover, he was so indefinite as to dates that even if he told the truth—which I say I think he did—in many respects he so exaggerated, in many respects he was so vague about dates that I could attach no considerable probative effect to his testimony.

Samuel Goldstein, the second witness, left a great impression upon me as a fine type of man. He is rough, he is uneducated; but he is clearheaded, he is modest, he is truthful. He conceded that he cheated. I think he was forced into the situation where self protection caused him to cheat. It is one of the regrettable features of the one cent a pound imposition upon him—which he felt was unjust and to which he had to yield in order to remain in
165 business—that when the representatives of the market men tried to collect it from him, he would show them only a part of his bills, and not the others. In that sense he cheated. Many another man would have done the same thing. I cannot call him a dishonest man for doing it. As I have stated, in his own testimony he, in effect, admitted that he was a party to the conspiracy. He is one of the illustrations of what I call among the market men victims of or perhaps enforced participants in the conspiracy.

Both the Perlmans impressed me as fine citizens; perfectly frank and fair. The father has been 37 years in the poultry business. He told the truth. He had a fine son here; in his rough clothes, with his intelligent face and well brought up appearance, I think he told the truth. Max Keslin did not take the stand to deny what Abraham Perlman, the son, said. Just think of the effrontery that was exhibited to these persons when they sought to buy at West Washington Market. Under the false guise of enforcing union rules, persons desiring to purchase there were practically driven out of the market. Max Keslin told Perlman: "You can't buy here; you are on the black list." Keslin does not deny this. That was not within the law—not within the most liberal court decisions under those circumstances.

You can refuse to load, you can refuse to cooperate, but you could not properly drive a man out and say, "You can not buy." That is going outside the realm of the lawful. The young man told the truth about it.

166 Samuel Bernklau was biased, very biased, engaged in a controversy trying to accomplish a purpose in a row between the butchers and the poultry dealers. Yet I would not call him untruthful; he was merely over biased. As I have said, I am not satisfied about 1931 prices; but, as I have also previously said, some of the other witnesses, whose testimony is not seriously contradicted by the witnesses produced here, convince me that there were numerous price raises during 1931. While in some respects, as to prices, Bernklau is much disputed, we need not determine the conflict. For the decision of the case we may entirely disregard Bernklau's testimony.

The two accountants, Marshall and Lipkin, were entirely truthful so far as I could see. I do not criticize them at all. But there is a question as to the analysis, the kind of analysis and the function

of the analysis that they gave of the figures they furnished. I could not ultimately determine that question without reserving decision and going into all the material—which counsel have not fully discussed before me.

Now, gentlemen, the witnesses that made the most impression on me in this trial are the humble people. Frequently ignorant, sometimes they do not speak the language, and it is extremely difficult to hear them; but I can but feel that those people did not sufficiently comprehend what were the issues in this case to come in here and intentionally lie, even if they had had the disposition to testify falsely. They would not know how. They came and told their experiences. I think, in large part, they told the truth; at least they helped by furnishing a key to the truth.

167 I think Sam Davis told the truth. He is a rough man; but what a piece of effrontery for a union delegate to tell Sam Davis, a good citizen like Sam Davis, "Get the hell out of here and get back to Jersey where you belong." That is the kind of thing he was subjected to when he went to West Washington Market to purchase. That was an interference with commerce and was entirely outside the range of the enforcement of rules or contracts of the unions or the protection of the rights of the unions.

Abraham Aaron, humble, modest, told the truth; though ignorant, I accept his testimony in preference to that of Louis Aronin. As I have already said, he is truthful. I have not enough before me to enable me to determine whether Aronin was a party to the conspiracy or not. He is not a defendant; but I do not doubt in the slightest the accuracy of Abraham Aaron's statement that Aronin told him that if he sold to strange customers, why, the union would put an extra man in his market. Though Abraham Aaron told the truth, I do not accept as evidence in this case against the defendants his statement as to what was said to him by Aronin, because I am not sufficiently convinced by the evidence that Aronin was a party to the conspiracy. Again, I do not doubt the testimony of Abraham Aaron as to the prices he paid for poultry at the Sunset Market.

I prefer the testimony of David Scott to that of Abe Rosenberg. I prefer the testimony of Wolfsohn to that of Morris Gerber, and of Rubay to that of Seewald. I think Sam Davis and Finkelstein

168 told the truth about the shutting off in New Jersey of purchases by people who wanted to go over there from New York. I think Danziger told the truth about the union men loafing on the job in order to coerce market men. I think Lillie Horowitz told the truth.

But, gentlemen, suppose I assume the truth of all the testimony (omitting for the moment Exhibit A) offered by the defendants; there are two singular features about it. The representatives of the unions called as witnesses almost exclusively market men or market employees and their proof is almost wholly confined to what happened in 1931. In addition, if we accepted all the testimony in behalf of the defendants as true, it is insufficient to prevent decree for the Government in this case. As I have already said, the testimony of Aaron

Steinberg alone is enough to establish the only thing about which there has really been serious controversy at this trial; and that is whether there is threat of continuance or whether there is actual continued existence of the conspiracy. Couple Steinberg's testimony with the failure of the defendants to take the stand—the failure of those who are primarily accused, who were right here in court and active in the trial—and the conclusion, as I conceive it, is inescapable that the truth lies with the Government.

Gentlemen, this case is important; important in many ways. It involves food. Inevitably it involves religion, to which we must pay the utmost respect and to which we should give the greatest consideration. It affects and involves many who apparently are aliens, who cannot speak the language. If they are not aliens, they are certainly new citizens. Many of them are poor; many of them are ignorant. The rich can take care of themselves; the poor cannot.

169

The poor are entitled to more consideration by the court than anybody else. What an impression of the institutions of our country must be given to these poor people by their experiences as they have related them here on the stand!

The case is also important, because it has been established that there is no free market in poultry. Whatever we may say about the conflicting testimony as to 1931 prices, the whole proof in the case leads incontrovertibly to the conclusion that practices like those which have been shown lead necessarily to enhancement of prices to consumers. If nothing else, an additional overhead is put on the industry that does not belong there. Whom does that effect? Why, it affects the poor people largely; and what is worse than that, gentlemen, it affects the diet of people who are compelled to buy in order to live up to their religious convictions.

The case is important from another angle. The proof has shown satisfactorily—it is undenied; people accused by name and present in court did not testify to the contrary—that the means employed to carry out the conspiracy were or included deception, threats, sabotage, destruction of property, and violence; also that there is suspicion of graft. I cannot say that taking of graft by defendants was conclusively established, but there are people involved who are left under the grave suspicion of accepting graft.

What relief should be granted?

The sentencing of people convicted in criminal cases is the most arduous dut yof any judge. It is the most difficult work he has to perform. About it the greatest care should be taken. Next to that—at least sometimes, as I conceive it—is the question of whether an injunction should be granted. An injunction is capable of doing much harm. Yet it is essential that it be employed at times; otherwise, people would be irretrievably deprived of their rights. The only remedy that they have is an injunction. Nevertheless, I agree with all that counsel have said about the care that should be taken by a judge before he awards an injunction.

170

In this case there are several unusual features. First, there has been a jury verdict. That verdict has established the principal fact. The jury had already reached the conclusion which substantially I have reached on independent consideration of the same problem. Secondly, the Circuit Court of Appeals has settled the crucial question of law. We knew what was the law to be applied before we began this trial. Thirdly, before the case came to me it had had the consideration of five other judges in this court. It came to me, as I stated to you in the early part of this trial, without my having heard of it except by reading in the newspapers generally about the criminal trial. I knew nothing about it. Under those circumstances, after a five weeks' trial before me, I think it has been thoroughly established that the Government is entitled to an injunction.

If there is to be an injunction, it ought to be effective; it should be sweeping in its terms. Why?

The proof shows previous efforts by the State government and previous efforts by the Federal government to deal with the same
171 situation. While many of the individuals involved in the State inquiry were the same as in the Federal inquiry, it does not make any difference whether they were the same or not. As I have so often said this morning, the Sherman Act deals with conditions and with situations. It is also designed to furnish a remedy. While the conditions and situations affect an industry, an effective cure can be found only by dealing with persons. I have also said that the leniency in the criminal case was plainly misconstrued. It is a duty, therefore, of this court, as I see it, at this time to grant an injunction, so that the court may at least thereby make an effort to bring the defendants to a course of conduct that is in harmony with the law.

Not alone that, gentlemen, but I believe it best for the unions themselves that there be an injunction; it is also best for the market men that there be an injunction. If the course of conduct of the unions established by the proof in this case should be persisted in, eventually it would lead inevitably to more drastic action than an injunction. It is the inescapable that men cannot continue indefinitely to defy the law in the way the unions have done without suffering punishment ultimately.

Counsel have said that to grant an injunction would embarrass the unions in their wage fights with the market men. Well, if that be so, they brought the handicap on themselves. But I do not think it is true. The market men are also to be enjoined. I think under the terms of the injunction that the unions, if they are of a mind to keep themselves within the law, will by the injunction have
172 protection against the market men if the market men should have a mind not to obey the law.

There will therefore be a decree for an injunction against all the defendants except Jacob Damsky and Samuel Silverman.

Now, as to the procedure.

Every material allegation of the amended petition has been proved. Probably my statement here today would be taken by the Court of Appeals or by the Supreme Court as sufficient compliance with the recent Supreme Court rule requiring separate findings of fact and conclusions of law. This, however, being a case of importance, I deem it better that there be submitted to the court, in compliance with local equity rule 18, proposed findings and conclusions. As I have said to counsel, in order to preserve your rights on appeal in an equity case you do not have to do what you do in the State court, that is, request findings and have them rejected. It is not at all necessary. It is a great comfort to me that I can be reversed if I be wrong. I want counsel to have adequate opportunity to review me. It is mere waste, however, to put yourselves to the labor of preparing proposed findings out of harmony with what I have said today. What I have said is my decision. The findings and conclusions should be drawn in complete accord with that decision.

The procedure will be as follows:

The Government will propose three things—First, findings; these to be in form for signature if adopted, so that it will not be necessary to alter it if it be approved. Second, and at the same
173 time, a proposed form of decree. Third, if the Government desire, a separate memorandum, in accordance with the requirements of equity rule 18, of citations of parts of the record you desire me to look at in support of the proposed findings. Let the Government serve copies of those three papers on Mr. Kaufman and Mr. Kroppy, with notice of settlement for fifteen days later, unless you agree on some other date. Within ten days after that service Mr. Kaufman, Mr. Kroppy, and their associates may serve on the Government such counter-proposals as they wish. If defendants' counsel agree to parts of what the Government has served, there is no use of drawing what they desire in the shape of complete findings or a complete decree; but it will be sufficient if they ask for such amendments *or changes as they* desire. Then on the date fixed by the notice of settlement, which will give the Government five intervening days after the defendants have served their proposed amendments, all the papers should be submitted to me.

The decree will carry costs. It should contain the usual clause permitting further applications at the foot. In addition—and this is of great consequence; I ask counsel to bear it in mind—it should extend the term of the court for five years. That will keep it within the power of the court to make alterations if it should be determined later that mistakes have been made; that it went too far or did not go far enough. Inasmuch as the case is important in the aspects which I have mentioned, I should like to see the court retain power to amend the decree, if hereafter convinced that, in actually operating or working, it is deficient or unjust in its provisions.

174 The Supreme Court has said in regard to the Sherman Act that under it the Government substantially is a trustee for the public. By virtue of the statute and that interpretation of its effect it was the manifest duty of the Government to institute and prosecute this suit. The Government is to be commended for having done so.

Counsel for defendants have tried this case with such ability and with such fairness that they deserve the thanks of the Court. I have decided it against you. Yet I think you have defended your clients as becomes members of the bar and in such way as has been of assistance to the court in comprehending your contentions.

It has not been easy or agreeable for the court to reach the conclusion that an injunction is required in the sweeping terms I have indicated; nevertheless, the court feels that it would be recreant to its duty under the facts and under the law, as I view the law, if it failed to award such a decree.

Mr. KAUFMAN. I think your Honor has covered everything, except the question of parties.

The COURT. The decree is to run against everybody except the two defendants whom I have mentioned as not sufficiently connected by the proof with the conspiracy.

Mr. KROPPY. I want the record to show that I do not waive the right to submit proposed findings.

The COURT. Yes; you or any other of the counsel may submit whatever you wish.

175 Dated December 18, 1931.

FRANCIS G. CAFFEY,
United States District Judge.

Filed Jan. 4, 1932.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 15th day of May in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the One Hundred and Fifty-ninth.

[SEAL] CHARLES WEISER, *Clerk.*

176 *Exhibit No. 12 to response*

Stenographer's minutes

United States District Court, Southern District of New York

UNITED STATES OF AMERICA

vs.

JOSEPH WEINER ET AL.

Before Hon. FRANCIS G. CAFFEY, District Judge

STATE OF NEW YORK,
County of New York, ss:

Michael Gilligan, being duly sworn, deposes and says: That he is a certified shorthand reporter engaged in his profession for more than twenty years; that as such shorthand reporter he was engaged to report the above entitled matter on June 4th, 1934; that he caused his stenographic notes to be transcribed by means of the typewriter, and that the foregoing pages 1 to 88 inclusive, are a correct transcript of his shorthand notes.

MICHAEL A. GILLIGAN.

Subscribed and sworn to before me this 16th day of May, 1935.

A. GEORGE MAUL,
Notary Public, N. Y. Co.

177 United States District Court, Southern District of New York

UNITED STATES OF AMERICA

vs.

JOSEPH WEINER ET AL.

Before Hon. FRANCIS G. CAFFEY, District Judge

STATE OF NEW YORK,
County of New York, ss:

Samuel Bruckheimer, being duly sworn, deposes and says: That he is a certified shorthand reporter engaged in his profession for more than twenty years; that as such shorthand reporter he was engaged to report the above entitled matter on June 5th, 1934; that he caused his stenographic notes to be transcribed by means of the typewriter, and that the foregoing pages 89 to 116, inclusive, are a correct transcript of his shorthand notes.

SAMUEL BRUCKHEIMER.

Subscribed and sworn to before me this 16th day of May 1935.

A. GEORGE MAUL,
Notary Public, N. Y. Co.

178 United States District Court, Southern District of New York

C95–434

UNITED STATES OF AMERICA

vs.

JOSEPH WEINER ET AL.

Before Hon. FRANCIS G. CAFFEY, J.

New York, June 4, 1934, 10:30 A. M.

Appearances: Martin Conboy, Esq., United States Attorney, for the Government, By Walter L. Rice, Esq., and Raymond P. Whearty, Esq., Assistant Attorneys General, of Counsel; Samuel H. Kaufman, Esq., Attorney for Defendant Weiner.

The COURT. Gentlemen, I have received four letters in behalf of the defendant Joseph Weiner, two dated June 1st, 1934, from Marcus A. Rothschild and Harvey W. Brooks, one dated June 2nd, from Philip M. Grousman and one from Emanuel Shallsman, the latter dated June 3rd. If counsel desire to examine these, they may do so.

179 I have received quite a number of letters previously. These have all been replied to and transmitted to the United States Attorney to be filed in this case.

The present letters will go to the files of the United States Attorney where they may receive consideration.

I understand that the defendant Weiner wants to make a statement. He did not make a statement at the time of sentence. I will hear his statement now.

The CLERK OF THE COURT. Shall I swear him, your Honor?

The COURT. No. He is not a witness in the case as to the guilt or innocence of the defendants. I will hear any statement he has to make. I get more help out of a statement of fact made by a defendant himself. If counsel wants to add anything, I will hear him.

Defendant WEINER. When I went into the poultry feed business, your Honor, I went into it and invested some money in order to make a livelihood. I didn't do anything wrong at all. Everything was up and above-board in anything I did.

The COURT. Is there anything else you want to say?

Defendant WEINER. About the S. S. & B. case I am positively innocent in that case.

The COURT. Anything you want to say as to why you did not take the stand as a witness in your case?

Defendant WEINER. I wanted to take the stand, but my

180 counsel thought it best that I should not take the stand. That is why I did not take it.

The COURT. He probably was wise. Your counsel in the State Court apparently gave you the same advice.

Defendant WEINER. In the State Court I never had a chance at all.

The COURT. Oh, yes; you did. You had a chance. You could have testified in the State Court or in this court. Anybody on trial can testify.

Defendant WEINER. I didn't have a chance.

The COURT. Yes; you did. I saw the record.

Mr. KAUFMAN. Will you explain to his Honor what took place in the State Court?

The COURT. No; I don't care to hear anything about it. If he has anything to say as to the sentence imposed on him, I will hear it. I am not going to try the case over again.

Mr. KAUFMAN. We are not asking for a new trial, your Honor, or as to the question of the guilt or innocence of the defendant. I merely want the witness to explain what took place in the State Court in connection with the motion that was made, which your Honor characterized as a demurrer to the evidence.

The COURT. All right, I will hear him.

Defendant WEINER. My counsel filed briefs and he told me I
181 was to have a day in court, and still was found guilty and never had a chance to say anything in court.

The COURT. Why did you repeat that performance in the Federal Court?

Mr. KAUFMAN. Was there an appeal pending at the time of the trial in the Federal Court and was that appeal pending in the Court of Appeals during the course of the trial here?

Defendant WEINER. That is right.

The COURT. Well, of course we all know that.

Mr. KAUFMAN. And that appeal was decided by the Court of Appeals.

The COURT. I have never been able to see what bearing that had on his not taking the stand in this case.

Mr. KAUFMAN. My conception was primarily for the State Court, that this case would follow the situation in the State Court, or might follow the situation in the State Court, and, therefore, having expected a reversal in the Court of Appeals I felt that that issue would be tried in the State Court where it occurred.

With respect to the appeal in the appellate division from the judgment and conviction in the State Court the voting of the judges was four to one. In the Court of Appeals only six of the seven judges sat and the voting was four to two, two of the judges writing an opinion, a short memorandum to the effect that in their opinion there was no trial in Special Sessions.

182 The COURT. All right. Anything else?

Mr. KAUFMAN. May I make some inquiries from this witness with respect to the SS&B matter?

The COURT. Yes.

Mr. KAUFMAN. How long have you known Sam Weiner?

Defendant WEINER. Six or seven years.

Mr. KAUFMAN. You just told his Honor that you were innocent of the charge in connection with the SS&B incident. Will you tell

the Judge everything that you know about that particular transaction?

Defendant WEINER. I went to the SS&B Market for the signing of a contract. I had nothing otherwise but a contract at all. Some of the tight members were fighting the union and I thought I would go up and sign a contract. That is all I had to do with it.

Mr. KAUFMAN. Did you ever have an interest in the coop company?

Defendant WEINER. No.

Mr. KAUFMAN. Did you ever get any salary of any kind from the coop company?

Defendant WEINER. No, sir.

Mr. KAUFMAN. Did you have any interest in the marketmen or anyone else using coops of the New Jersey Coop Company?

183 Defendant WEINER. No, sir.

Mr. KAUFMAN. Now you had previously been convicted of a crime, had you not?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. When?

Defendant WEINER. In 1916.

Mr. KAUFMAN. In 1916, what crime were you convicted of?

Defendant WEINER. Breaking and entry.

Mr. KAUFMAN. Where was that?

Defendant WEINER. In Newark, New Jersey.

Mr. KAUFMAN. And what sentence was imposed on you at that time?

Defendant WEINER. I got a year.

Mr. KAUFMAN. Now, since 1916, in connection with this conviction, have you ever been in any trouble of any nature, kind, or description?

Defendant WEINER. No, sir.

Mr. KAUFMAN. You were one of the defendants in the criminal case before Judge Knox?

Defendant WEINER. Yes, sir.

184 Mr. KAUFMAN. And the indictment was dismissed as against you, was it not?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. At the conclusion of the Government's case?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. Is that the only trouble you have gotten into since 1916?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. And since 1916 you have had various occupations?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. When did you go into the poultry business?

Defendant WEINER. About 1927.

Mr. KAUFMAN. And you stayed in the poultry business how long?

Defendant WEINER. Until July of last year.

Mr. KAUFMAN. At the time of your conviction in the Bronx you resigned as a delegate of the Schoctim Union?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. And at that time you sold your stock in the feed company?

Defendant WEINER. Yes, sir.

185 Mr. KAUFMAN. And since that time you have received no salary from either one of those sources?

Defendant WEINER. No, sir.

Mr. KAUFMAN. And since the time of your conviction until the time you went into the penitentiary did you have anything to do with the poultry business?

Defendant WEINER. No, sir.

Mr. KAUFMAN. Now, did you have anything at all to do with the sending of the Dratt boys to the S. S. & B. Market?

Defendant WEINER. No, sir.

Mr. KAUFMAN. Did you know the Dratt boys?

Defendant WEINER. No, sir.

Mr. KAUFMAN. Were the Dratt boys, or any of the seven men whose pictures appear on the photograph, with you when you went to see Sam Weiner some time in December of 1932?

Defendant WEINER. No, sir.

Mr. KAUFMAN. Who was with you when you went there?

Defendant WEINER. I think I was up there alone.

Mr. KAUFMAN. And at no time did you have anything to do with those seven men implicated in that situation?

Defendant WEINER. No, sir.

186 Mr. KAUFMAN. Now, during the last several years have you devoted yourself to some charitable activities, Mr. Weiner?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. What were they?

Defendant WEINER. Bread donors in the Bronx.

Mr. KAUFMAN. What do you mean by bread donors?

Defendant WEINER. We all go around to different places and give food to the poor people. Give it out on Wednesdays and Thursdays to people who cannot afford to buy their own food.

Mr. KAUFMAN. How long have you been engaged in that particular activity?

Defendant WEINER. Say about four years.

Mr. KAUFMAN. And what is the official name of the association that you are connected with?

Defendant WEINER. Bread Donors' Association.

Mr. KAUFMAN. Any other charities that you have been connected with?

Defendant WEINER. The Broadway-Saranac.

Mr. KAUFMAN. What is the Broadway-Saranac?

Defendant WEINER. To help consumptives.

187 Mr. KAUFMAN. What does the Broadway-Saranac do?

Defendant WEINER. Seek out people who have no money and who have consumption. We take and run affairs, theater parties, boat rides, and get enough money to keep a home up in Saranac.

Mr. KAUFMAN. Does the Broadway-Saranac maintain a sanitarium in Saranac, New York?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. Are you an officer of that association?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. Who is president?

Defendant WEINER. Mrs. Weintraub.

Mr. KAUFMAN. How long have you been a director and associate of that association?

Defendant WEINER. Four or five years.

Mr. KAUFMAN. What officer?

Defendant WEINER. Fourth vice-president.

Mr. KAUFMAN. And you have been devoting your time and some of your money to that particular thing?

Defendant WEINER. Yes, sir.

188 Mr. KAUFMAN. And you have been active in its affairs?

Defendant WEINER. Yes, sir.

Mr. KAUFMAN. Are you married, Mr. Weiner?

Defendant WEINER. Yes, sir.

By Mr. KAUFMAN:

Q. Any children?

A. One.

Q. And you have been living with your wife up to the time you went to the penitentiary?

A. Yes, sir.

Q. Where did you live?

A. 245 West 107th Street.

By the COURT:

Q. Manhattan?

A. Yes, sir.

By Mr. KAUFMAN:

Q. How long have you been married?

A. A little over six years.

Q. How old is your child?

A. Five years.

Q. A boy or girl?

A. A boy.

Q. In addition to that do you support your family?

A. Yes, sir; and I have a widowed mother.

Q. How old is she?

A. Sixty-eight.

Q. Does she know anything about this situation?

A. No. I have a brother who has consumption.

Q. And where is your brother?

A. Up in the mountains.

189 Q. At the Broadway-Saranac?

A. Yes, sir.

Q. Where is your brother now?

A. He is at the Ambassador Hotel. He has been down here now two weeks.

Q. How long has he had consumption?

A. About ten years.

Q. How long have you been taking care of him?

A. As far back as seven years. He cannot work. He lies on his back all the time.

Mr. KAUFMAN. If your Honor please, I am not going into the details of the crimes charged, because we are not here on the issue of the guilt or innocence of the defendant. Your Honor has found that. Has your Honor any suggestion as to any further inquiries to be made of this witness?

The COURT. How old are you?

Defendant WEINER. Forty.

The COURT. Anything further you want to say? Have you any questions, Mr. Rice?

Mr. RICE. Yes, your Honor.

By Mr. RICE:

Q. Now, Mr. Weiner, you say that you have contributed liberally to charities?

A. Yes, sir; as much as I could possibly spare.

Q. How much have you contributed to charities during the past five years?

A. Personally?

Q. Yes.

190 A. I don't know exactly, but from $750 to $1,000 a year.

Q. $750 to $1,000 a year?

A. Yes, sir.

Q. You say you take care of your brother?

A. Yes, sir.

Q. How much do you spend on him?

A. About $20 or $25 every week.

Q. That is another thousand dollars a year, is it not?

A. Yes, sir.

Q. And you contribute to your mother?

A. Yes, sir.

Q. How much do you contribute to her?

A. $20 or $25 a week.

Q. That is another thousand dollars a year?

A. Yes, sir.

Q. Who else do you contribute to? We have now got $3,000 given to charities by you.

A. Well, people come around for collections and I give them a few dollars, help organizations, the Broadway-Saranac and I try to get all the contributions I can. I go to different people.

Q. How much do those miscellaneous contributions amount to, in addition?

A. It is hard to say. I might give at times $5, $10, or $15 here and there according to——

Q. Now, how much do you think you pay to charities in all of these different ways, including what you pay to your brother, what you pay to your mother, what you pay to the Saranac Association, and what you pay to miscellaneous charities?

A. A thousand dollars maybe.

Q. A thousand dollars a year?

A. A thousand dollars.

191 Q. A thousand dollars a year. Now we have it already totaled up to $3,000.

A. You just asked me what I gave to miscellaneous charities.

The Court. He means additional.

A. Yes, sir.

Q. Do you think $4,000 a year covers it?

A. It might.

Q. Or is it more?

A. It is according to how I feel, according to what the charitable purpose is. Sometimes more; sometimes less.

Q. Now do you think your charities each year run under $4,000 a year?

A. Now, Mr. Rice, I went to Harris, the president of the Camp Israel and I gave him $500 at one time.

Q. Just answer my question. Do you think your charities run to $4,000 a year?

A. I think so. I cannot say positively offhand.

Q. You are a very substantial business man, are you not?

A. Yes, sir.

Q. You do business on a large scale, don't you?

A. Yes, sir.

Q. What you call business, it is on a rather large scale is it not?

A. Yes, sir.

Q. Your income is very substantial?

A. Yes, sir.

Q. How much is your income per year?

A. Some years $20,000; some years $25,000.

Q. Has it ever been as much as $150,000 per year?

192 A. No, sir.

Q. Are you sure about that?

A. Positive.

Q. You have an income of as much as $25,000 a year?

A. Sometimes.

Q. And you think it may have run over $25,000 a year?

A. Might be $500 more or $500 less.

Q. What did you do for a living?

A. I was in the Schoctim Union. I was interested in the feed company, and I like to bet on hockey games and fights, once in a while.

Q. That is your business, betting, gambling?

A. I do bet on the outside.

Q. That is the only business you talk about when you report to the Internal Revenue, your gambling business?

A. I file an income report for my Schoctim Union and if I win I report also.

Q. You had a substantial income from the beer business prior to the time beer was legal?

A. No, sir.

Q. Do you know Ed Blumenkrantz?

A. Yes, sir.

Q. Who is he?

A. He was in the poultry business.

Q. Yes; he was a commission man down in West Washington Market?

A. Yes, sir.

Q. Then he wanted to make some more money and went into the beer business?

A. I don't know what he did.

Q. He went into the beer business?

A. I don't know.

193 Q. Didn't you go into the beer business with Ed Blumenkrantz about four or five years ago?

A. No.

Q. Isn't it true you owned a 35 per cent interest in the Intrastate beer business in Brooklyn?

A. Positively not.

Q. Isn't it true you were getting an income of over $100,000 a year from that?

A. No.

Q. You know that Ed Blumenkrantz has been in the beer business for a long time?

A. No.

Q. You know he is still in the business?

A. No.

Q. You know he is in the legitimate business—the beer business—today?

A. I do not know.

Q. Now, with this income of $25,000 a year that you admit to, what did you do with this income? What did you do with it? How did you handle your money?

A. What do you mean how did I handle it?

Q. When you collected as much as $25,000 in one year, what did you do with it, put it in your pocket?

A. I lost and won sometimes.

Q. Did you put it in a bank?

A. My wife did.

Q. Your wife put it in a bank?

A. Yes, sir.

Q. Your wife maintained a little bank account amounting to a few hundred dollars, did she not, just a very insignificant bank account?

A. She had quite a few thousand dollars.

Q. What is her first name?

194 A. Dora, Dora Weiner.

Q. And her bank was the Industrial Bank or the Industrial Savings Bank?

A. No: Chatham & Phenix.

Q. Did she have more than one account?

A. That is all I think she had.

Q. Did you maintain a bank account?

A. No.

Q. Have you ever maintained a bank account?

A. Not that I can remember.

Q. Will you tell us why you have not maintained a bank account?

A. Mr. Rice, I made my mother an allowance, my brother an allowance, and I gave my wife an allowance, and when I bet I don't always win. I may win one day and not another day. Why I didn't file an income tax is because the betting is illegal in this State. One day I might win or lose a few dollars.

Q. You know that gambling is a very excellent cover for illegal purposes, particularly as to income?

A. No, sir. I openly said I gambled and I stated it in my income tax case. I didn't hide it.

Q. You know it is customary on the part of men of your character, men of the type who are in such businesses as you are engaged in, to represent that their earnings come from gambling?

The COURT. Mr. Rice, you do not get anywhere with argument. Just get facts. I will give you a free hand. Do not argue with the witness.

Q. Now, Mr. Weiner, isn't it true that you refrained from maintaining a bank account in order to conceal the amount and the source of your income?

A. No, sir.

195 Q. You had an income from the Schochtim Union of $6,500 a year?

A. That is right.

Q. And sometimes around $7,500 a year?

A. Mr. Rice——

Q. Just answer my question.

A. I want to tell you what I got. I got $125 a week. I am not denying it. It did not include my expenses. I cannot figure up my expenses to a penny.

Q. You got $125 a week from the Shochtim Union?

A. Yes, sir.

By the COURT:

Q. That is your entire income from the Shochtime Union?

A. I started at $75 a week and then got raised to $125 a week.

Q. When did you start at $75 a week?
A. In 1927 or 1928.
Q. When did you reach $125 a week?
A. I was receiving it when I resigned.
Mr. KAUFMAN. How long were you getting $125 a week before you resigned?
Defendant WEINER. I think a year and a half or two years.

By Mr. RICE:

Q. You were getting $150 at one time? When you were getting $125 a week from the Shochtim Union you reported a gross income from that source of $600 a year, reported that to the Internal Revenue?

A. I must have if it is there, positively.

196 Q. And at the same time you reported how much of that was expenses?

A. I think I reported $40 or $50 a week.
Q. Just a moment ago didn't you say $25 a week was expenses?
A. No, sir; I didn't.
The COURT. He didn't, as far as I heard it.
Defendant WEINER. I didn't.
The COURT. He never made any separate statement about $25. You misunderstood him.
Mr. RICE. Maybe I misunderstood him, your Honor.
The COURT. Bring out the facts.
Q. How much of that was actual expenses?
A. Whatever I put in my income tax.
Q. I don't want that answer. I want your memory.
A. I say $50 a week.
Q. Now, it has risen to $50 a week?
A. I said a minute ago $40 or $50.
Q. Don't you remember how much?
A. $50.
Q. You remember now it was $50 a week as expenses?
The COURT. That reduces your salary of——
Defendant WEINER. $75 a week, your Honor.
The COURT. We will take off from $6,500 a year $2,600 for expenses, that would leave $3,900 net.

197 Defendant WEINER. I think so.

Q. Now, what were these expenses and allowances for?
A. Well, riding around in taxis, going to the market, trying to put men to work.
Q. And you spent $50 a week on such expenses?
A. Yes, sir; I did.
Q. Do you think you actually spent that amount?
A. Yes, sir.
Q. Isn't it true, Mr. Weiner, for months at a time you were never even seen around the Shochtim Union offices?
A. No.

Q. That is not true?
A. No.
Q. At the time the Bronx District Attorney's office was looking for you, isn't it true that you were not near the Shochtim Union's offices for a period of at least three months?
A. No; I was sick for the time being.
Q. Isn't it true that you were not at the Shochtim Union offices for about two or three months at that time?
A. No.
Q. Prior to June 1933?
A. No, sir.
Q. Did you hear Mr. Rosenman testify in this trial?
A. Yes, sir.
Q. That he had transmitted——
The COURT. Put your question right.
Q. You heard Mr. Rosenman testify?
A. Yes, sir.
198 Q. You heard him saying that he paid you checks through Charles Herbert?
A. Yes, sir. I got Charlie Herbert's checks many a time from the office; that is true.
Q. Now, wasn't it customary for the payments to you to be paid through Charles Herbert?
A. No. I went up and got Charles Herbert's many times also.
Q. You never deposited any of these checks in any bank account?
A. No, sir.
Q. Now, what was your investment in the Metropolitan Poultry Feed Corporation?
A. $4,500.
Q. And what was your income per year from that source?
A. $150 a week.
Q. $7,800 a year?
A. Whatever it amounts to—$150 a week.
Q. In other words, Mr. Weiner, on a $4,500 investment you got a return of $7,800 per year?
A. Everybody else got the same as I did, Mr. Rice——
The COURT. Just answer the question.
Defendant WEINER. Yes, your Honor.
The COURT. $7,800?
Mr. RICE. $7,800, your Honor.
Q. You did not do any work for that, did you?
A. I invested my money. I saw a few people who were friendly to the market and asked them to buy feed.
199 Q. You would see people who had not been buying from you and tell them if they did not buy from you they would get in trouble?
A. There is not one man in this business that I saw and there are four hundred of them, not one can say that I spoke above a

whisper to them, not one can say out of the 400 marketmen that I did—just one.

Q. When you whisper a warning it is very effective, is it not?

A. I never spoke anything only in a gentlemanly way. That is what I mean.

The COURT. You continue to argue with the witness, Mr. Rice.

Mr. RICE. Very well, your Honor.

The COURT. He gave certain answers as to what he did when he was called before the police in reference to what he did.

Mr. RICE. I will get to that, your Honor.

Q. Now, when you were called before the police on April 8th, 1932, for questioning you were asked about your relationship with the Shochtim Union, were you not?

A. I don't remember.

Q. You don't remember?

A. What portion?

Q. Do you recall you were called before the police at the Tenth Detective District in Brooklyn?

The COURT. Do you recall the inquiry of the Police Department?

200 Defendant WEINER. Yes, sir.

Q. You were questioned about your connection with the Schoctim Union?

A. Yes, sir.

Q. Now you didn't even know the address of the Schoctim Union at that time?

A. Yes, sir; I did.

Q. Did you give the correct address to the police?

A. Yes, sir.

Q. What address did you give?

A. What date was that?

The COURT. We are not going into the question of this man's guilt. Why go into that detail? The question here is about charitable work and about his income. Why not stick to that?

Mr. RICE. Very well, your Honor.

The COURT. In there (indicating record) what work did you say you did for the feed corporation? That is what I am interested in.

Defendant WEINER. Well, I told them.

The COURT. Do you remember what you said?

Defendant WEINER. I think I have an idea. I told them I represented the company and I would ask them to buy feed. I think I said that.

Q. In spite of the fact that you were getting $7,800 a year—

201 I beg your pardon, $6,500 a year—from the Schoctim Union, you did not know the correct name of that organization?

A. Yes, sir; I did.

Q. On April 8th, 1932, you gave the name which that organization had had prior to the criminal trial before Judge Knox.

The COURT. Well, I don't care if he did. Why waste time on that, Mr. Rice? I want to give you a full hearing, but we are not trying the man.

Mr. RICE. I propounded those questions and I thought your Honor was interested in the legitimacy of his income from these various sources.

The COURT. Well, does that negative his statement that he got $6,500 in salary from the Union?

Mr. RICE. No; but it tends to show the purpose for which he got his income.

The COURT. No; it does not. No bearing on it.

Q. Now, you told Mr. Kaufman a moment ago——

The COURT. Let me see that paper or it will get away from me. (Mr. Rice hands paper to the Court.)

The COURT. During the time you were connected with the feed corporation, the president of the company was Sidney Rosenstein; is that right?

Defendant WEINER. Yes, sir.

The COURT. He is the man who was convicted on trial here?

202 The WITNESS. Yes, sir.

The COURT. Now, according to this, as I understand the statement you made to the police, you received quite as much as the president of the company?

Defendant WEINER. Your Honor, I would like to explain——

The COURT. Don't explain; don't explain now. I will give you a chance to explain after. According to this (indicating), you got $75 a week and you got $150 a week.

Defendant WEINER. There must be a mistake.

The COURT. You did say so here. I will read it to you. You were asked, on page 6 of the report of the police department on file in this case, "you drew how much?" And your answer is, "$150."

"Q. How do you come to draw $150 and he $75?

"A. I get the most amount of business.

"Q. But you didn't go near the place?

"A. No."

Mr. KAUFMAN. Your Honor will recall——

The COURT. Wait a minute. You will have every opportunity later on.

"Previous to your sale of stock of the feed corporation, for how long had you drawn $150 a week?

"A. All the while.

203 And you took your stock of that company in what year?

You did the same kind of work for the feed corporation during the time you were con'ected with it prior to the sale of the stock?

Defendant WEINER. I didn't do very much up to that time.

The COURT. In other words, you got the $150 a week when not doing anything for it?

Defendant WEINER. They all had that.

The COURT. So I understand. That was brought out at the trial. All of the delegates got $150 a week?

Mr. KAUFMAN. All of the stockholders.

The COURT. I am talking about the delegates. Now you can argue it they got it from stock. I am asking him, if the delegates, yourself being one of them, and Charles Herbert and Arthur Herbert were the others, didn't they get $150 a week?

The WITNESS. Yes, sir; they did.

The COURT. And the president of the company got $75 a week?

Defendant WEINER. I think he got raised to $150 also.

The COURT. You answered here $75 a week.

Mr. KAUFMAN. I think, your Honor——

204 The COURT. Wait, Mr. Kaufman, I will let you interrogate the witness. I want to get some facts now.

Defendant WEINER. $50 a week; they put their brothers to work. I didn't. Arthur and Sidney put their brothers to work.

By the COURT:

Q. You said in answer to the police you had a cousin working at $35?

A. A brother-in-law.

Q. I thought it said your brother. Is that your brother-in-law you referred to, Eddie Goldstein?

A. Yes, sir.

Q. He was not a cousin, he was a brother-in-law?

A. Yes, sir.

Q. Now you say, as I understand, in this, you didn't even know the names of the employes at that time; isn't that right?

A. No, sir.

Q. Here is the question:

"Q. Just who are?" implying by this at the time outside officers. "What were their names?

"A. I don't know their names."

Is that true?

A. That is true.

Q. Then you went on to say that Sidney Rosenstein and Charles Horowitz took care of this.

A. Yes, sir.

Q. Then you said here (indicating): "Most of the concerns that the rabbis worked for your concern sells them feed?" That was a fact, wasn't it?

A. Yes, sir.

Q. Now, you were asked by the police, page 5:

205 "Q. And how many other arrests are there?

"A. One more.

"Q. What is it?

"A. Burglary.

"Q. Convicted?

"A. Yes, sir.

"Q. Served time?
"A. Yes, sir."
Now is that the same offense you referred to as breaking and entry?
A. Yes, sir.
Q. And for that you served a year, is that right?
A. Yes, sir.
The COURT. You may ask him further questions. Anything else you want to say in regard to the feed business, working for the feed concern?
Defendant WEINER. The only thing I can say I did everything open. I didn't do anything wrong. I didn't break any injunction. Going in I put my money in there, got my salary. I didn't threaten anybody or talk to anyone in any other way than like a business man speaks. I thought I would get an income. I was satisfied to do it. I didn't think I was doing anything wrong by investing my money in it. I left everything standing as it is. I don't think I done a wrong thing. I tried to get business. I was offered money to make a reduction in price. I wouldn't do that. The members of the Schoctim Union were getting $60, and I got propositions to make it $50. I could have gotten thousands of dollars, but I wouldn't do it.
I tried to do the work as clean as possible. I was getting $150
206 a week and I could have got thousands of dollars, but I wouldn't do it. I tried to be as clean as I possibly could.

By Mr. RICE:
Q. Now you say, Mr. Weiner, in 1916 you were sentenced to the penitentiary on the charge of breaking and entering?
A. Yes, sir.
Q. Or as you say now burglary?
A. That is what I got, breaking and entering.
Q. Wasn't that burglary of a safe?
Mr. KAUFMAN. I object to that.
The COURT. Sustained. You need not go into the details.
Q. Now in 1923 you were arrested for the possession of narcotics, were you not?
A. No, sir.
Q. You were not?
A. No, sir.
Q. You were arrested and turned over to the Federal authorities on March 28, 1923, on the charge of possession of narcotics?
Mr. KAUFMAN. I object to that, your Honor.
The COURT. Sustained. I am not going into that. All I am going into is his convictions.
Mr. KAUFMAN. In view of the suggestions made, I hope that it does not linger in your Honor's mind.
The COURT. It won't linger in my mind.
Mr. RICE. Will your Honor permit me to go into the
207 substantive question as to whether or not Mr. Weiner was in the business of peddling narcotics and in the business of peddling of beer?

The COURT. No; we are not going to waste time on that.

Mr. KAUFMAN. I trust, if your Honor please, it will not linger in your mind that this man ever had anything to do with narcotics—never even arrested for it.

The COURT. I told you that it would not linger in my mind.

Mr. KAUFMAN. No such claim was ever made. That is something new in this case.

The COURT. Even if the case were on trial I would not permit it.

Q. You were making about $25,000 a year back in 1929, were you not?

Mr. KAUFMAN. I object to that.

The COURT. No. He brought his income in himself.

Mr. KAUFMAN. For the last two years.

The COURT. You cannot confine it exactly.

Q. Back at least to 1929 you were making at least $25,000?

A. If I did, I paid my income tax.

Q. In 1929 you didn't file your income tax?

A. Unless I settled my income tax.

Q. In 1930, despite the fact——

208 The COURT. Do not argue. Get the facts.

Q. In 1930 you did not file an income tax return for that year?

A. No.

Q. It was not until after the Income Tax people had gotten after you in the year 1931——

The COURT. Please do not indulge in all this argument. Put your question, please. I will give you free rein, but don't argue with him.

Q. In 1931 you did file a delinquent income tax return for the years 1929 and for the year 1930?

A. I think I did.

Q. And these delinquent income tax returns were filed after the Internal Revenue Bureau had gotten after you?

Mr. KAUFMAN. I object to that, if your Honor please.

The COURT. No; I will take it.

A. I don't think so. I went to Washington myself, Mr. Rice.

Q. Now, is it not a fact that you did not file any income tax return prior to the time that the Income Tax people investigated you?

A. I don't think I did.

Mr. RICE. Very well.

Q. Now, you know a man by the name of Nat Levy, do you not?

A. No.

Q. What is your answer?

A. I don't know who you mean.

Q. You never heard of Nat Levy?

209 A. No, sir.

Q. Did you know that the Income Tax Unit tapped the wire at Nat Levy's office in order to get information on you?

A. I don't know who you mean, Mr. Rice.

Mr. KAUFMAN. I object to that, if your Honor please.

Mr. RICE. I believe, if your Honor please, if I could go into this matter it might be pertinent.

The COURT. I am ruling on the question asked and I sustain the objection.

Mr. RICE. All right, your Honor.

The COURT. If you put proper questions, you will be permitted to put them.

Q. Do you know that Nat Levy was in the business of distributing beer prior to the time beer was legal?

Mr. KAUFMAN. I object to that on the ground it is immaterial.

The COURT. I cannot tell at present.

Q. Don't you know that?

A. No, sir.

Q. Didn't you participate with Nat Levy in that business?

A. No, sir.

Q. Didn't you have a large interest in that business in Brooklyn?

A. Positively not.

210 Q. You were not associated with him in any way at all?

A. No, sir.

Q. Have you told us of all your business connections?

A. Yes, sir.

The COURT. Then this means this, your net income from the Schoctim Union was $3,900 with deductions?

Defendant WEINER. Yes, sir.

The COURT. Your net income on a $4,500 investment was $7,800 a year?

Defendant WEINER. Yes, sir.

The COURT. $7,800 a year was exactly twice as much as you got for being delegate?

Defendant WEINER. Yes, sir.

The COURT. You got $3,900 for being a delegate and $7,800 from your investment?

Defendant WEINER. Yes, sir.

The COURT. The two added together make $11,700. Your income you say was $25,000 a year?

Defendant WEINER. Yes, sir.

The COURT. You have given us all the businesses you were engaged in?

211 Defendant WEINER. Yes, sir.

The COURT. That would mean you got thirteen to fourteen thousand dollars income from gambling?

Defendant WEINER. Yes, sir.

The COURT. You cannot tell us anything except gambling, that you were engaged in betting?

(No answer.)

Q. Now, Mr. Weiner, didn't you tell the Income Tax agents that your income from gambling alone was $25,000 per year?

A. No, sir.

Q. You did not?
A. No, sir.
Q. Did you tell them you had no income from gambling, any net income?
A. What do you mean by net income?
Q. That is any profits.
A. Any profits I had I filed my income tax report.
Q. Did you keep track of your profits?
A. I had it in a book.
Q. What happened to the book?
A. Since I went to the penitentiary I don't know where it is.
Q. Did you ever show that book to the Income Tax officials?
A. They never asked me for it.
Q. Did you ever show it to any persons who made up the delinquent income tax return?
A. Yes, sir.
212 Q. Then they didn't make up the income tax return on the basis of your bookkeeping?
A. No, sir.
Q. How did they make it up?
A. I told them what I got at the end of the year and I told them to fill in the income tax return on it.
Q. Who made up your income tax returns?
A. He has an office on 41st Street and Broadway. His name is—well, it will come to me as I go along—the address is 1450 Broadway.
Q. Is he an accountant?
A. Yes, sir.
Q. Don't you know his name?
A. It don't come to me right now.
Q. Did he make up all of your income tax reports?
A. No; the last two.
Q. What was the basis of the figures he used in making them up?
A. I told him that I got $150 a week from the feed corporation and how much I got from the Schoctim Union, and then I told him at the end of the year what I made from gambling.
Q. Those are the only sources of income, the Schoctim Union, the Metropolitan Feed Corporation, and your gambling earnings?
A. Yes, sir.
Q. Now, I am asking you again when you made up your income tax return as to the gambling profits. Did you show this accountant your books?
A. No.
Q. Did you just guess at the figures?
A. No; I figured it up.
Q. You figured it up?
213 A. Yes, sir.
Q. Didn't you let him figure it up?
A. No, sir.

Q. Wasn't he your accountant?
A. He just made my income tax up.
Q. Couldn't he figure it up much better for you if he had some books?
Mr. KAUFMAN. I object to that, your Honor.
The COURT. Sustained.
Q. Did you have the book with you at the time you told him what the profits from your gambling were?
A. I figured every day or every week, won so much this week, lost so much, I would keep track of it.
Q. Did you give him just one figure for the whole year representing the net amount of your profits from gambling?
Mr. KAUFMAN. I object to that.
The COURT. Sustained.
Q. You cannot produce that book for us now?
A. No.
Q. You are sure it is not at your home?
A. Positively.
Mr. KAUFMAN. I object to that. We are not trying an income tax case here.
The COURT. Sustained. Strike out the answer.
Q. Now, the Income Tax people claimed $15,700 income tax due from you, did they not?
214 Mr. KAUFMAN. I object to that.
The COURT. Sustained.
Q. You actually paid on settlement of income tax $8,000, did you not?
Mr. KAUFMAN. I object to that, your Honor.
The COURT. No; I will take it.
A. I paid it.
Q. You paid $8,000 for income tax?
The COURT. For what years?
Q. What years?
Mr. KAUFMAN. You have the record.
A. I cannot remember it now.
Q. How much time did it cover?
A. You have it there [indicating]. I do not know.
Q. Did it cover two years?
A. If I knew I would tell you.
Q. It was 1929 and 1930?
A. It might have been. If you say it is true—I know I paid it.
The COURT. Two or three years back, that is all we want. What does that $8,000 cover, the year 1929 or the year 1930?
Mr. RICE. The years 1929, 1930, and 1931.
The COURT. Then it is for three years?
215 Mr. KAUFMAN. That is correct, your Honor.
Q. Now, as a matter of fact, Mr. Weiner, were your gambling profits and losses about even?
Mr. KAUFMAN. I object to that.

The COURT. Overruled.

Mr. KAUFMAN. For what year?

Mr. RICE. For each year.

Defendant WEINER. No, sir.

The COURT. The point about it is that this man has come in here and told us about the distribution of largess in various charitable enterprises. Now, in explanation, he has told us some of the things to which he gave money, and when you take his income here and his responsibilities, it calls for an explanation. He had $2,500 a year income, and now then he tries to explain that by showing that he got twelve or fourteen thousand dollars a year from betting. It is a legitimate cross-examination.

Mr. KAUFMAN. The only objection I have is as to the year Mr Rice is referring to.

The COURT. All right. Tell us what year.

Q. Now in the years 1929, 1930, and 1931, is it not a fact that your betting losses and gains just about equalized each other?

A. Then I could not pay an income tax on it.

216 The COURT. Why don't you answer the question?

Defendant WEINER. I am trying to do so, your Honor.

The COURT. No; you are offering argument. Were your losses about equal to your wins?

Defendant WEINER. No, sir.

Q. Who is your bookie?

A. What?

Q. Your bookmaker, so-called bookie?

Mr. KAUFMAN. For what year?

Q. Now, Mr. Weiner, I am talking about the years 1929 and 1931.

A. Quite a few people I bet with.

Q. Who was your favorite bookmaker at that time?

A. When you bet on horses you bet with the bookmaker who gives you the best price and you give your business to him.

Q. Do you know a bookmaker by the name of Samuel Flanders?

A. Yes, sir.

Q. You were one of his best customers?

A. I don't know his business.

Q. You did most of your gambling on horses through Samuel Flanders, did you not?

A. No, sir.

Q. Now is it not a fact that your losses just about offset your gains for the years 1929–1930 for gambling?

A. No.

217 Q. What other forms of gambling did you engage in besides betting on horses?

A. Hockey games.

Q. What else?

A. Fights, baseball games.

Q. Anything else?
A. That is about all.
Q. Did you bet fairly heavy?
The COURT. Sustained. Don't answer. Don't waste our time.
Q. Who is Charles Weiner?
A. My brother.
Q. He is an older or younger brother?
A. Older.
Q. How old is he?
A. About 44.
Q. Where does he live?
A. Brooklyn.
Q. What does he do for a living?
A. He used to work in the post office.
Q. You do not know what he does today?
A. No; I am in the penitentiary, I do not know what he does today.
Q. What did he do in 1929, 1930, and 1931 for a living?
A. I think he worked in the post office then.
Q. Was he in business with you?
A. With me; no.
Q. Was he your dummy in business?
Mr. KAUFMAN. I object to that, your Honor.
Mr. RICE. I can rephrase that, if your Honor wishes.
Q. Was he the man through whom you transacted some of your deals?
218 A. What deals?
Q. Any deals at all.
A. I didn't have any deals with him.
Q. Did you have any business relationship with Charles Weiner?
A. My brother you are talking about? I had no business with him.
Q. Did you have any business with Charles Herbert other than the feed business and the Schoctim Union?
A. No.
Q. And with Arthur Herbert other than those two?
A. No, sir.
Q. Is it not a fact, Mr. Weiner, you operated what is known as a loan shark business?
Mr. KAUFMAN. I object to that, your Honor.
The COURT. Overruled. Have you got any proof on that, Mr. Rice?
Mr. RICE. Yes, your Honor; very definite.
The COURT. Well, go ahead.
A. No, sir.
Q. Did you ever engage in the business of lending money?
A. No, sir.

Q. Did your brother Charles Weiner ever engage in the business of lending money?

A. I don't know.

Q. You don't know that he did?

A. No, sir.

219 The COURT. You understand what counsel means by the words "loan shark" business?

Defendant WEINER. Yes, sir.

The COURT. You understand that?

Defendant WEINER. Yes, sir.

The COURT. Have you covered the period, Mr. Rice, that you expected to come back to?

Mr. RICE. I am still dealing with that period, your Honor, 1929, 1930, and 1931, inclusive.

Q. Do you know a man by the name of Kurtz?

A. I cannot remember; no.

Q. You never heard of a man by the name of Kurtz?

A. Not that I can think of.

Q. Did you and Kurtz engage in the business of making small loans to individuals in the poultry business?

A. No, sir.

Q. Did you engage in the loan business whereby you lent money under an arrangement that provided that the borrower should pay back 6 per cent interest, plus a 10 per cent bonus?

Mr. KAUFMAN. I object to that as not material, your Honor.

The COURT. It is material on his own statement. He is the man who is asking credit here for having done a great many char-

220 itable things, and in that connection he has explained how he got his income. It is proper cross-examination.

A. No, sir.

Q. You say your brother, Charles Weiner, from 1929 through 1931 was employed in the post office department?

A. I don't say positively. I know he worked in the post office.

Q. He was a mere clerk in the postal department, was he not?

A. I think he was.

Q. How much did he make per year?

A. I do not know.

Q. Something like $1,800 a year?

A. I don't know.

Q. He was not making a large sum of money?

A. I cannot tell you; I don't know.

Q. Now, is it not a fact that you financed your brother, Charles Weiner, in the loan shark business and let him carry it on in his name——

Mr. KAUFMAN. I object to that.

The COURT. Overruled.

A. I did not.

Q. Is it not a fact that the firm of Weiner & Kurtz maintained a bank account in the Industrial National Bank of New York City from April 8, 1929, until September 25, 1930?

A. I do not know.

Q. Is it not a fact that for the nine months of 1929 Weiner & Kurtz deposited a total of $175,720.14 in the Industrial National Bank?

221 Mr. KAUFMAN. I object to that, on the ground that it is totally immaterial, your Honor.

The COURT. The man denies any knowledge whatsoever of it.

Q. Mr. Weiner, is it not a fact that in the year 1929 you operated, through your brother, Charles Weiner, and that you had a net income of more than $24,000 from the loan shark business?

A. No, sir.

Q. And is it not a fact that you had an income of more than $24,000 from that concern in the year 1930?

A. No, sir.

Q. You say that you never heard of your brother being engaged in the loan business?

A. No, sir.

Q. You never heard of him lending money?

A. No, sir.

Q. You know that on his salary he could not lend money to anyone in substantial amounts?

Mr. KAUFMAN. I object to that.

The COURT. Overruled. He brought it in. It is proper cross-examination.

A. I do not know what my brother does.

Mr. KAUFMAN. There is no question or issue here that he did have an income of $24,000.

The COURT. Oh yes; there is.

222 Mr. KAUFMAN. Mr. Rice wants to indicate he made more than that.

The COURT. He has raised it himself. He is asking credit for having been charitable.

Q. Mr. Weiner, has your brother, Charles Weiner, ever been engaged in the poultry business?

A. Not that I know of.

Q. To your knowledge does he know it?

A. Does he know it?

Q. Yes.

A. Not to my knowledge.

Q. Has he any broad acquaintance in the poultry business?

A. Might have.

Q. Is it not a fact that Charles Weiner and Kurtz were lending money in substantial amounts in the poultry trade?

A. I don't know what other people do.

Q. Is it not a fact he was lending your money?

A. Nothing to do with me at all.

Q. Now, Mr. Kaufman asked—I believe Judge Caffey asked you about your failure to testify in this proceeding?

A. Yes, sir.

Q. Tell us why you didn't testify.

The COURT. I did not ask him. I just called his attention to the fact that he failed to avail himself of the opportunity.

Q. Why didn't you testify?

A. My counsel told me I should not.

Q. Did you testify that your counsel did not want you to testify?

223 A. Yes, sir.

Q. Did you tell him you had a lot of things to conceal?

A. No, sir.

Q. You didn't tell him you would rather take a chance of not testifying?

A. No, sir. I wanted to take the stand.

Q. Now you don't object to telling us what Mr. Kaufman told you?

A. Yes, sir; on account of my appeal in the Court of Appeals.

Q. Mr. Kaufman told you because you had an appeal pending in the Court of Appeals you should not testify?

A. Yes, sir.

Q. Do you know what that relationship had to your failure to testify?

A. I had no idea. That is what I have counsel for.

Q. Did it make common sense to you?

A. No.

Q. Did you see any relationship between those two things?

A. That is why I asked him. That is why I had counsel.

Q. He simply told you because an appeal was pending in another case you should not testify?

The COURT. Don't let us waste time on that. He had a right to stay off the stand for any reason. I am giving no weight whatever to that.

Q. Now, in the proceedings in Special Sessions, in Bronx County, you engaged James D. C. Murray?

A. Yes, sir.

224 Q. And he had been counsel for the seven men who had been convicted before you?

A. Yes, sir.

Q. You don't object to telling us what conversation you had with Mr. Murray, do you?

Mr. KAUFMAN. I object to that.

The COURT. Sustained.

Q. Did Mr. James D. C. Murray tell you that he had information that somebody else had instigated the wrecking of the market?

Mr. KAUFMAN. I object to that.

The COURT. Sustained.

Mr. RICE. If your Honor please, may I——

The COURT. Sustained. Proceed. It has nothing to do with the question. I am not going to try this man over again.

Mr. RICE. May I make this inquiry: will your Honor allow me to go into the question as to whether or not this defendant instigated the wrecking of the S. S. & B. Market?

The COURT. Do you want a new trial?

Mr. RICE. No, your Honor. I understand there is a courtroom full of witnesses, and I assume some of them are very interested.

Mr. KAUFMAN. None of them were.

225 The COURT. I am not going to allow it. It would be entirely destructive of the entire trend of administering justice.

Mr. RICE. I quite agree with that, your Honor.

The COURT. Every defendant would stay off the stand if after having been convicted he could then appear in another proceeding and give testimony, after all the witnesses have gone. It would be ridiculous.

Mr. KAUFMAN. The witnesses are not going to be offered on that subject, as your Honor well knows.

The COURT. They have got their chance now. The defendant gambled by staying off the stand at the time of the trial.

Q. Now, back in 1927, 1928, and 1929 you were at that time a delegate of the Schochtim Union, were you not?

A. I think so.

Q. And at that time you were assisting in maintaining the——

Mr. KAUFMAN. I object to that.

The COURT. What has that to do with this?

Mr. RICE. If your Honor please, on direct examination the question was gone into as to whether or not he was not acquitted in that proceeding.

The COURT. I don't care if he was.

226 Mr. RICE. I propose to show there is other evidence that shows beyond any doubt that Mr. Weiner was one of the major parties to that proceeding.

The COURT. I don't care if he was or was not. I don't care either way. That is not what I am here for. I am not going to try his guilt in some other case.

Q. Before Joe Cohen passed away he was engaged in a certain phase of the poultry business, was he not?

Mr. KAUFMAN. I object to that.

The COURT. I am not going into the question whether this man Joe Cohen was engaged in a certain phase of the poultry business.

Mr. RICE. I am not going into that question, either, your Honor. However, I would like to go into this question: Joseph Weiner and Arthur Herbert endeavored to move into Joe Cohen's business, endeavored to get a share of his very lucrative business.

The COURT. All right.

Mr. RICE. I dignify it by the name of business.

The COURT. Go ahead. I suppose the question was inquired into in the State court. I don't know anything about it except what I saw in this proceeding of the police report, but I cannot go
227 into that. He has come here and taken credit because he has said that he is a charitable man. Now that is all.

Q. You said on direct examination you did visit the S. S. & B. Market?

A. Yes, sir.

Q. In regard to the Schochtim union contract?

A. Yes.

Q. Now, was that visit just before Christmas of 1932?

A. Some time in December.

Q. Some time in December, 1932?

A. Yes, sir.

Q. Now, you say you were alone?

A. Yes, sir.

Q. Are you positive you were alone?

A. Yes, sir.

Q. Wasn't it a fact you were accompanied by five or six other men?

A. No, sir.

Q. Is it not a fact that you very seldom go to any place alone?

The COURT. Why do you want to go into all that? Mr. Rice, I have ruled in your favor on it, and you are trying to drive me away from it. I think it is entirely inconsistent with the scheme of administering justice in the courts of the United States. Go ahead.

Mr. RICE. That is all, your Honor.

The COURT. Any further questions?

By Mr. KAUFMAN:

Q. You are serving a sentence in the penitentiary at the
228 present time in connection with the conviction in the State court, arising out of the so-called S. S. & B. incident, is that so?

A. Yes, sir.

Q. Has your term yet been fixed by the Parole Board, or is it yet to be determined?

A. It has not yet been determined.

Mr. KAUFMAN. That is all.

The COURT. I would like to ask some more questions. A gentleman called upon me stating that there was another thing you contributed to, that has not yet been mentioned, as I understand, and he said you had contributed to some youth in the medical profession, as I recall it, giving as much as $1,200 a year to send a young man to medical school, is that right?

A. The Beth Israel Hospital?

The COURT. I do not know. He did not tell me the name of it.

Defendant WEINER. I gave to some hospital, also to some women's hospital, I donated there also. I can't remember everything.

The COURT. You would not forget if you gave $1,200 a year to educate a boy, you would not forget that, would you?

Defendant WEINER. I don't know what it is just right now.

The COURT. All right.

Mr. KAUFMAN. May I have the last question read? I did not quite hear it.

229 The COURT. The term of the sentence by the State court has not yet been taken, Mr. Rice, the so-called indeterminate sentence up to three years, and as I understand the law, Mr. Kaufman, that is then left to the parole board to fix the quantum of the sentence.

Mr. KAUFMAN. And then with respect to any reduction he is on parole, subject always to commitment and re-arrest.

Mr. RICE. If your Honor please, our agent has obtained this information from Mr. A. Fauer, senior parole officer, room 2500, Municipal Building, New York City, phone Worth 2-2560, that Joseph Weiner, sentenced July 5, 1933—I will read this precise statement: "I am the committing Justice; and wrote to the commission that he should be confined for two years. The Judges thought he should serve six months in view of the Federal sentence, but if released from the Federal prison before two years are served then will take him back. Was given six months only because of the Federal sentence of two years in prison. Weiner is going to be released the early part of August 1934.

Mr. KAUFMAN. No such decision as yet.

Mr. RICE. Just a moment; about August 3rd to August 6th, 1934.

The COURT. That is no basis; I do not know what you are talking about. They have fixed the term or they have not.

230 Mr. KAUFMAN. They have not.

The COURT. I am asking you have they or have they not fixed a sentence.

Mr. RICE. Mr. Watzman tells me now definitely fixed the sentence at six months because of the Federal sentence.

The COURT. When did the serving of the sentence begin, on what date?

Mr. RICE. May I have Mr. Watzman state directly what he ascertained?

The COURT. Was it in February?

Mr. RICE. February 6, 1934, he was recommitted.

The COURT. February 4th actual incarceration began?

Mr. KAUFMAN. That is not correct.

The COURT. Actual incarceration as I understand. As I recall the evidence at the trial, immediately after he was sentenced he was put in prison and then released under bail and he had been in jail for a few weeks or a few days, I don't recall the exact period when released on bail. Then went back on February 24th, that is my recollection. Now tell me, has he served his sentence from the time he went in, yes or no?

Mr. RICE. Yes.

231 The COURT. For a period of how much?

Mr. RICE. February 6, 1934, six months.

The COURT. Six months, and the further fact is that in view of the Federal sentence——

Mr. RICE. Yes, your Honor; he is to be released between August 3rd and August 6th, 1934, I think, allowing a couple of days for the mechanics——

The COURT. I don't care anything about that.

Mr. KAUFMAN. Mr. Weiner served approximately ten days after his conviction, before which time he was released on a certificate of reasonable doubt, and on appeal, so his actual time began to run approximately ten days from the date of February 6th. Mr. Rice is thoroughly mistaken about the sentence having been fixed and determined by the Parole Board, totally mistaken about it. We hope that is the fact.

The COURT. I will hear his statement.

Mr. KAUFMAN. We are hopeful that is the fact but it has not yet been fixed and determined.

The COURT. What you mean by that, Mr. Kaufman, I suppose, is this which the Government refers to, that is merely a recommendation to the Parole Board.

Mr. KAUFMAN. A recommendation to the Parole Board must be acted on (1) by the Parole Board and then by the Justices of
232 the Court of Special Sessions. That has not yet been completed. Do you know that to be a fact, approved by the Court of Special Sessions Justices?

The COURT. You are acquainted with the recommendation that has been made by the Judges of the Court of Special Sessions that is referred to in the statement read by the Government?

Mr. KAUFMAN. Yes, your Honor.

The COURT. They recommended that the sentence of six months be fixed in view of the Federal sentence of two years.

Mr. KAUFMAN. That is correct.

The COURT. Then it is your further understanding that some of the officials, I do not know who they are, or care who they are, over in the Municipal Building, having received that recommendation from the Judges, now await its adoption by the Parole Board, is that correct?

Mr. KAUFMAN. That is right.

The COURT. And you further tell me that before it can go into effect it must first be approved by the Parole Board and second by the Judges.

Mr. KAUFMAN. Yes, your Honor.

The COURT. What difference does it make about making a recommendation, when they have accepted it?

233 Mr. RICE. Because the Judge who must now approve the recommendation of the Parole Board is not one of the Judges who made the original recommendation.

The COURT. In other words, it is still an open question.

Mr. WATZMAN. I obtained this information from the senior parole officer of the commission over the telephone, and his statement simply fixed it at that by the parole commission. I did not go into the mechanics of it.

The COURT. It is left entirely to you to find out if there is a definite time.

Mr. WATZMAN. I will find out right away.

The COURT. You want me to cut off the Federal sentence in view of the State sentence?

Mr. KAUFMAN. No; I want the court to know the facts.

The COURT. That is the effect of it.

Mr. KAUFMAN. We know what the attitude of the State court is.

The COURT. I am informed that what the evidence is over there is to get the State sentence into the Federal sentence. I may be misinformed, but that is what he told me. Counsel for the prisoner went before the board and put it in writing to that effect.

234 Mr. KAUFMAN. I have had no communication of any kind, nature, or description with regard to it.

The COURT. I do not mean you.

Mr. KAUFMAN. Or any counsel representing the defendant, because I understand they will not hear counsel for any prisoner.

The COURT. I am not criticising counsel. I am referring to the defendant or someone in his behalf. I am entirely sympathetic with anyone who is in prison.

Anything else you want to say?

The DEFENDANT. No.

Mr. KAUFMAN. We have here a Mrs. Weintraub, your Honor.

The COURT. Yes; she talked with me and sent me a regular report.

Mr. KAUFMAN. She is the president of twenty auxiliaries of the Broadway Saranac Association; that Mr. Weiner has been a very helpful member of the Association for several years.

The COURT. I understand all that.

Mr. KAUFMAN. I may say to your Honor that she has made an independent investigation and picked out some thirty names at random; that she and her State committee called on thirty persons and that not one of them had any criticism to make of the conduct

235 of Weiner in the poultry business. Does your Honor want to hear her under oath?

The COURT. Why waste time on it? I know what she told me.

Mr. KAUFMAN. In addition to that, I have had twenty or twenty-five persons in the poultry business called on the telephone and requested them to be here, persons who have not testified, persons who have not listened to your Honor, but who will testify in substance with respect to their relationship with the defendant Weiner, whom they have known for a number of years. They have no criticism to make of him. Their impression of him is that he is a good citizen. I can call those persons unless your Honor does not want to hear their testimony.

The COURT. If you so tell me, I assume that it is so.

Mr. KAUFMAN. They will so testify, your Honor.

The COURT. All right.

Mr. KAUFMAN. Now, I say that in the light of the facts, that nobody has been produced by the Government during the course of the trial other than the complainant, who had any criticism to make of the defendant Weiner, I think their story, plus the letters your Honor received, are most important, and I say with respect to the general proceedings, that you found the defendant guilty, we may differ, but I respect your Honor's decision and conclusion. However, I urge again that your Honor has been unduly harsh in the imposition of sentence on the defendant Weiner, and as I conceive it, particularly for one reason.

236 The COURT. What is the reason?

Mr. KAUFMAN. The reason is—the reasons may be numerous. The underlying cause, in my opinion, is that the defendant did not take the stand during the course of the trial.

The COURT. No; you have no right to indulge in that.

Mr. KAUFMAN. Your Honor has a right to go to that point in the question of imposing sentence, not on the question of guilt or innocence.

The COURT. No; I did not at all say so.

Mr. KAUFMAN. I had the distinct impression your Honor's theory was that Weiner was not a worthy citizen. From my knowledge of this situation I feel that he is a worthy citizen and entitled to an early opportunity to rehabilitate himself in the community in which he lives and in which he has the respect of many persons.

So far as the ends of justice in this case are concerned, I think they can be fully served if there is docketed the suggestion that I originally made, that the decree in this case be amended so as to keep Mr. Weiner out of the poultry business for good, so that the nefarious business that Mr. Rice contends him to be in will not be the case, but that he will forever be out of that particular business.

The COURT. I did not understand that at the time. You mean by that suspending sentence, is that what you mean?

237 Mr. KAUFMAN. I think that is going too far, but I do feel there should be a substantial reduction in that sentence in view of all the sentences, and in addition to the sentence, the defendant Weiner consents to an amendment of the decree made by your Honor so as to make it a violation of that decree if he should hereafter directly or indirectly engage in the poultry business or in any of its phases. Now the purpose of the Government will then be better accomplished. If the Government is serious that Mr. Weiner is the cause of all the difficulty and strife in this business, it can get him out of that business for good and forever.

The COURT. Well, I am not going to trade with you on a Mexican decree. Before we get to the question I want to see if there is any other evidence.

Mr. KAUFMAN. Well, the only other people I have to offer——

The COURT. Mr. Rice, have you any?

Mr. RICE. No, your Honor; I have Sam Weiner available, should you like to hear him.

The COURT. Sam Weiner testified before.

Mr. RICE. I don't presume your Honor would care to hear him now.

Mr. KAUFMAN. I am not going to trade with your Honor. However, the Government can have an agreement from me any times it pleases, without any trading.

238 I think in view of the general situation and of the life that the defendant has attempted to live since his mistake of 1916, that the sentence of your Honor is unduly harsh, particularly in view of the fact that he has to serve a sentence, whether short or long, in the State, and he stands committed now of two crimes for the so-called same act. The S. S. & B. is one crime. That will stand against him and his children forever. Your Honor's verdict of guilty in this case is a second sentence for the so-called same act. I say that, under all the circumstances, a reduction of sentence should be made. That does not touch the other question of the running of the feed company sentence and the S. S. & B. sentence running concurrently. That we will raise again, the legal proposition, if you want information on that particular subject.

The COURT. Oh, yes. Go ahead; I will take everything.

Mr. KAUFMAN. Your Honor, as I understand it, you permit the service of two sentences concurrently, where the court has made it clear in its judgment that it intends the two sentences to run concurrently.

The COURT. There is only one question on that. That has been settled time and time again. As a general proposition there is no question about it. The question is, and the sole question is, as I see it, whether where one case is for a felony and the other misdemeanor, and the misdemeanor sentence is to be served in the United States House of Detention, whereas the penitentiary sentence is to be served in a penitentiary of the United States, is there lacking power to make them run concurrently?

239 Mr. KAUFMAN. On that precise question I have not been able to find any law.

The COURT. Have you taken it up with the United States Government?

Mr. KAUFMAN. We have not.

The COURT. You ought to.

Mr. KAUFMAN. From a reading of the Thompson case, if your Honor arranges that both of these sentences run concurrently, and in addition to imposing a six months sentence without directing the place where it shall be served, that there won't be any question that this sentence will then be able to run concurrently.

Mr. RICE. If your Honor please, the Government can not agree with Mr. Kaufman's suggestion that the sole reason for prosecuting

the defendant Joseph Weiner in regard to his relationship with the New Jersey Coop Company, was the complaint of Samuel Weiner. It has been perfectly notorious in this industry for years that Joseph Weiner has been maintaining the monopoly of the New Jersey Coop Company. The Government was never able to prove that a definite sum of money was paid by the New Jersey Coop Company to Joseph Weiner, but it has been notorious that Joseph Weiner has been serving that company, that he has been serving that company illegally.

Now at the time of imposing sentence counsel suggested to
240 your Honor that in view of the State conviction and the sentence of a maximum of three years at Welfare Island, that your Honor should be lenient in imposing sentence here.

In reply to that your Honor stated the punishment for violation of the decree of this court is entirely separate from any punishment under the State law. Your Honor has considered that situation and I submit your Honor has decided it correctly. Joseph Weiner has violated a Federal order as well as the law of the State.

Now it is quite apparent from what has been submitted to your Honor here this morning that if Joseph Weiner's sentence has not actually been fixed at six months, under the State conviction, that the probability is, and the almost certainty is that it will be fixed at six months, and that that reduction is being given in view of the fact that your Honor imposed a sentence of two years and six months in this case.

I wish to call your Honor's attention to the fact that Joseph Weiner's sentence to the Federal Penitentiary of two years will actually be served in a period of one year and seven months, with time off for good behavior, and that his sentence of six months in the House of Detention will actually be served in exactly five months. Six days per month is awarded to the convicted in the Federal Penitentiary and five days per month for good behavior in the House of Detention.

The COURT. That is contrary to my impression as to the House of Detention. Is that correct?

Mr. RICE. I have obtained this information from Mr. God-
241 chalk, who is attorney for the Prison Bureau at Washington, D. C. He is the man who is most familiar with this. He deals with this subject every day, and practically nothing else. He has computed the time exactly, and found that the aggregate sentence of two years, plus six months, running consecutively, the aggregate sentence will be about exactly two years. In other words. he gets off five months in the penitentiary, and he is allowed thirty days in the House of Detention. I have the more precise figures here, if your Honor is interested.

The COURT. Yes.

Mr. RICE. Under the sentence of two years to the penitentiary, he gets off six days per month. In other words, he would be allowed 144 days time off. That would reduce his penitentiary sentence to

one year and seven months and, perhaps, two days or one and a half days.

Now, the sentence to the House of Detention of six months entitled him to five days per month for good behavior, a total of thirty days allowance. That thirty days deducted from the six months leaves exactly five months which he will have to serve, one year plus seven months on the first sentence, plus the five months on the short sentence, will equal almost exactly two years.

Now, the probability, and I believe that your Honor will agree it is practically certain that this defendant will serve only six months from February 6, 1934, at Welfare Island. He will be released there on either August 3rd or August 6th, 1934. From that time on he will have an aggregate of only two years more to serve. In
242 other words, Joseph Weiner will be again in this community within a period of about two years and three months from today.

Now, I submit your Honor was extremely fair and, if anything, lenient in imposing sentence upon this defendant at his trial.

I might call your Honor's attention to the fact that the United States Congress today is considering a so-called anti-racketeering bill, which provides specifically for a sentence of one to ninety-nine years in the penitentiary for acts of the character committed by the defendant Joseph Weiner. That statute has been enacted, or that statute is being enacted, for the specific purpose of imposing severe sentences upon defendants of the character of Joseph Weiner.

Today, under the provisions of the Sherman law, the maximum sentence which Joseph Weiner could have obtained if he had been charged merely with a violation of the Sherman Act would be one year on each count.

The United States Congress, or at least the committee, the Judiciary Committee of the Senate and the Judiciary Committee of the House, have determined that those sentences are grossly inadequate because of the character of these acts. In addition to the sentence of one to ninety-nine years provided for in this bill it is provided that the defendant shall be required to pay a fine, which shall be graduated in accordance with the amount of his unlawful gain. In other words, if it can be established that a defendant has gained unlawfully to the extent of $100,000 as a result of his racket, then a fine of $100,000 will be imposed on him in addition to the sentence of one to ninety-nine years. By one to ninety-nine
243 years I mean the maximum sentence which could be imposed would be ninety-nine years. I don't mean an indefinite sentence.

Now I wish to call your Honor's attention also to the fact that no fine has been imposed on this defendant. Your Honor could not impose a fine because the Judicial Act of 1789 simply provides that the court may punish contempt of its authority by fine or imprisonment.

Your Honor has chosen to impose a term of imprisonment, and your Honor was powerless to impose a fine if you felt that it was warranted.

The COURT. Except as an alternative.

Mr. RICE. Except as an alternative. Now I wish to say further, if your Honor please, that people in the poultry business and officials of the Federal government have been greatly impressed by the method in which your Honor has handled this case.

The COURT. That has no bearing on this sentence. It has no bearing whatever. If I listened to that I would be unworthy of my position. Don't tell me anything about that.

Mr. RICE. I don't wish to be misunderstood, your Honor, as——

The COURT. There are people back there that don't believe I did right. I am not taking their approval or the Government's approval, officials or anybody else.

Mr. RICE. I don't mean that, your Honor. I merely wish to say this, that this industry has been subjected to great abuses in
244 the past years and the industry has not been afforded the relief which it should have, perhaps partially because of the great difficulty in obtaining evidence.

I submit that this court has performed a very worthy function for this community and for this industry by imposing a severe sentence upon the ringleaders of various rackets, and I should very much regret to see any of the work of this court undone.

The COURT. Mr. Rice, you have given me no help on this law question that I asked counsel to look into at the time I originally imposed sentence.

Mr. KAUFMAN. I have not received a copy of the brief.

Mr. RICE. I have found this, as Mr. Kaufman has said, it is perfectly clear that where it is indicated that the trial judge——

The COURT. When that is clear, that is all right; everyone knows that. There is no proof about that. That is not the question at issue.

Mr. RICE. Here your Honor specifically imposed a sentence of two years on counts five and six, a sentence to the penitentiary, and on count four your Honor imposed a sentence of six months, which was exactly the sentence that you imposed on Arthur Herbert under the same count, and Sidney Rosenstein likewise.

The COURT. As I said, I was willing to consider later whether it should run concurrently if I had the power to do so. All I want is to know what power I have.

245 Mr. KAUFMAN. Your Honor said you would entertain such an application.

The COURT. Yes; it is here now.

Mr. RICE. Now, if your Honor please, I have not been able to find any authority whatever.

The COURT. Have you taken it up with the United States authorities?

Mr. RICE. I have looked into the questions of law myself and I have discussed it fully with the Prison Bureau in Washington and also with Mr. Godchalk, who is counsel for the Prison Bureau, and he advised me that it would not be possible for a sentence to the House of Detention to run concurrently with a sentence to the penitentiary. The two sentences would be utterly inconsistent.

The COURT. That is the view entertained by the United States Attorney's office, acording to my understanding for some time.

Mr. RICE. Mr. Whearty has discussed it with the attorneys of the Criminal Division and they likewise advised him that those two sentences cannot run concurrently.

The COURT. Now you keep telling me somebody else's opinion, but you don't give me any help. That is why I put it up to both of you gentlemen. I knew then as you are now telling me, and it don't help me.

246 Mr. RICE. I collected a great mass of papers on these matters which I know your Honor is not interested in now, but I could not find a single case even by analogy suggesting that these sentences could run concurrently, and the fundamental nature of the sentences, from a common sense point of view indicates they cannot run concurrently.

Mr. KAUFMAN. Mr. Rice, they can be made to run concurrently if the place for the six months sentence is not designated.

Mr. RICE. Except for the fact, your Honor, it is impossible to serve a six months sentence in a penitentiary. Your Honor has specifically designated so far as that is concerned that the six months sentence should be served in the House of Detention.

The COURT. That is easily changed. That does not answer Mr. Kaufman's suggestion as to that.

Mr. RICE. I have conferred on that and likewise been advised by Mr. Godchalk, and my own inquiry confirms it, that a six months' sentence or in fact any sentence less than one year cannot be served in a Federal penitentiary.

The COURT. A year and a day.

Mr. KAUFMAN. You have not answered the question. As a matter of fact, the Court does not have to designate the place of sentence at all, because under the present law the place of sentence is fixed by the Attorney General.

247 Mr. RICE. May I suggest this, if Your Honor please, if you did change the thing designating that six months must be served in a penitentiary, that sentence would be null and void.

Mr. KAUFMAN. The Court don't have to do that.

Mr. RICE. Because the law makes it——

The COURT. There is no suggestion that be done, and I would not do it, so that the suggestion does not get us anywhere.

Mr. KAUFMAN. In the Thompson case there is a sentence of six months to the penitentiary, and it was held by the Court of Appeals that——

Mr. RICE. May I have the copy?

The COURT. Have you been able to get hold of any definite facts about the State sentence?

Mr. WATZMAN. Yes, your Honor. I spoke to the chairman of the Parole Commission, John C. Maher, and he stated that the Special Sessions Court had written to the Parole Commission and stated they thought the defendant should serve two years, and that the matter came up before the Parole Commission on April 26, 1934, at which time the parole commission had decided that in view of the fact that the Federal court sentenced the defendant to two years, they would make their sentence six months. They have withheld submitting this to the committing justice pending the decision on the motion
248 which they learned had come up here for reduction of sentence.

They say if sentence is reduced they will take the defendant back from the Federal prison at the conclusion of the term there. If the sentence is not reduced, they will submit this sentence of six months to the committing court, which they expect will approve it, because the court indicated it was proper. However, that will not be submitted to the court until they learn of the sentence here.

He also advised that the six months' period which they had in mind would expire, with credit for the ten days, either on July 24, Tuesday, 1934, or Friday, July 27, 1934, their release days being Tuesdays and Fridays.

The COURT. Then, Mr. Kaufman, as I understand, the report from the conversation that has been had over the telephone with the chairman of the State Parole Board, in substance and effect it is this, that if the first sentence is allowed to stand, the State sentence will be reduced to six months, so far as it has control of the State Parole Commission, that six months to run from February 6, 1934, with credit for ten days preceding that time. On the other hand, if the Federal sentence is reduced, then after the completion of the Federal sentence the defendant will be called back to serve in the State penitentiary until the entire time of the State and Federal sentences will equal at least two years. Is that the substance of it?

Mr. WATZMAN. Yes, your Honor. He stated they would retain possession of the case for the period of three years and then file a warrant.

249 The COURT. Is that your understanding?

Mr. KAUFMAN. I will take the statement. I don't know that to be the fact.

The COURT. I want to ask the State Officer a question. You are in charge of the prisoner, are you not?

The STATE OFFICER. Yes; for today, your Honor.

The COURT. I understand that. Could you bring this defendant here at ten-thirty in the morning?

The STATE OFFICER. Yes, sir.

The COURT. Now, it seems to me I had better give you an opportunity, Mr. Kaufman, to find out definitely. I have no doubt that

the report here made is in precise accord with what the Chairman of the State Parole Commission stated over the telephone. Nevertheless, if you want to inquire into it further, I think you ought to have the opportunity to do so.

In the next place, Mr. Rice, we have not gone into this question of the power of the court with respect to concurrent sentences, where one of the offenses is a felony and the other is a misdemeanor, in such a way as enables me to pass on it. To merely tell me what someone else thinks does not help me to decide it myself.

Now, I recall that the question was up, I think it was in those anti-lottery cases. My recollection is that it was one of the cases in which the United States Attorney had up the question of the power of
250 the court where one sentence on one count was to the penitentiary and a sentence on another count was to the House of Detention. The sentence on one count was a felony and the sentence on the other count was a misdemeanor, but in these anti-lottery cases somebody in your office would know about it.

Mr. RICE. I took it up with Mr. Treadwell and with others in the office who are familiar with all matters of sentence and it was their opinion that the sentences could not run concurrently.

The COURT. I do not care about cases. If you will give me the material, look at the statutes, give me the regulations of the Department of Justice that govern. Under the existing law the Attorney General designates the prison for penitentiary sentences, but my impression is that he does not where the sentences are for a misdemeanor.

Now, there are two things about it, what do the statutes provide, and, second, what is the actual practice.

Mr. KAUFMAN. Isn't the premise one of a felony sentence and the other of a misdemeanor sentence?

The COURT. No; I don't think so. My impression is this, it grows out of what you say, a penitentiary sentence, I mean a felony sentence, and a misdemeanor sentence as a matter of law cannot be served in the same place; as the law exists today, it cannot.

Now, as a consequence of that, the conclusion has been reached by certain legal experts, and I think it has never been determined by a court, that where, as a matter of law, two sentences are re-
251 quired to be served in two different places, they cannot be allowed to run concurrently.

Mr. KAUFMAN. Is that cured by not designating the place?

The COURT. Not in the slightest, because, Mr. Kaufman, as a matter of law even though he did not designate the place, they cannot be served in the same prison. It is inherent that if one count be for felony and the other be for misdemeanor, they cannot be served in the same place. Moreover, if I failed to designate the place for the service of the misdemeanor count it is fixed anyway.

Mr. KAUFMAN. In view of your Honor's indication at the time of the imposition of the sentences here, would not the entire needs of justice be filled if the sentence on the so-called felony charge stood with respect to everything that your Honor is going to make it as a

result of this evidence, that is a sentence on the feed corporation count, if it were suspended, would require the serving of two years and your Honor would have sufficient justification by reason of the arising of the legal questions. Your Honor at the time of the misdemeanor sentence indicated that you wanted him to be sentenced for two years to run concurrently, provided a legal way could be found to have it done.

Now, in view of the legal question that has arisen, cannot sentence on the other be suspended to permit the closing of some such sentence as your Honor wants with respect to the S. S. & B. Market?

252 It goes further, so far as the court is concerned, and continues Weiner under the supervision of the court for such a period as the court may desire with respect to that sentence that has been suspended.

The COURT. Well, I have thought about that and I will be perfectly frank with you about it. These services of these delegates were nothing but plain graft. You need not tell me about this defendant owning $4,500 worth of stock and getting $7,500 income from it in one year, and all of the delegates getting $125 a week. It was just common garden graft.

Mr. KAUFMAN. Your Honor, the Government has taken the position that it was a distribution of the profits.

The COURT. I don't care what the Government's position is. This is graft. I called attention to this, to the graft that was being distributed at the time of the injunction trial, and that they should go into it and put a stop to it.

Now, at least that is my view of all these annual payments, or weekly payments to these delegates, was merely graft. Now, that has been my view, unless you can persuade me of some different view of the facts, and I am extremely reluctant to make an adjustment here by any suspension of sentence on a conviction of graft.

Mr. RICE. May I say something, your Honor?

The COURT. Let me hear Mr. Kaufman. I am being frank with you. I was not going to make the remark until you raised the question.

253 Mr. KAUFMAN. The only element of proof with respect to the feed company matter is that the prices charged by the feed company were higher than the prices charged by other feed companies. On that premise, on that fact, your Honor constructed the entire theory that they charged higher prices, because the officials of the union were interested in the feed company and that definitely those were the means by which the officials of the union were getting graft. Let us assume your Honor's process of reasoning is absolutely sound. The reason that we are here is because your Honor has come to that conclusion. Your Honor, taking all of the facts into consideration at the end of a heated, of a long trial, indicated the imposition of a sentence of two years on one count and six months on the other, intending definitely at that time, if your Honor

was sure about the legal problem that he should serve two years and six months, to run concurrently.

Now after all this time passed, when they all looked at the situation with a clearer vision, when we take into account the human element, your Honor is not going on some theory, say because of the legal question, because of my prejudice against graft, your Honor is not doing it because the sentence of the others stand, the sentence here is to be the excuse by reason of the fact that he is serving the entire time that your Honor originally intended he should.

The COURT. You don't get my point, Mr. Kaufman. You ask me as a device for accomplishing a result, which I told you I was willing to accomplish, if it were lawful, a method which I hesitate to adopt, namely, suspension of sentence. That is a different thing.

Mr. KAUFMAN. If your Honor please, so far as the future of
254 this situation is concerned, I say to your Honor without trading, the Government can have the consent agreement, a decree, that the defendant will at all times in the future stay out of the poultry business.

The COURT. I understand that.

Mr. KAUFMAN. Without trading. That has nothing to do with what your Honor does here. He is out of the feed company. If your Honor wants to accomplish the purpose that your Honor originally intended, and that is to serve a sentence, because after all the entire matter grows out of one thing, if that is the only way it can be conscientiously done. I am going to ask your Honor to set aside the prejudice with respect to what your Honor thinks right and let it stand on that basis.

The COURT. Now you take the witnesses that testified about the services they rendered to the feed corporation for $150 a week. It is a little short of ridiculous, that they should be paid $150 for such trifling services.

Mr. KAUFMAN. On the basis of services I agree with your Honor fully, but if your Honor feels it is merely the means by which certain people draw money out of a corporation and call it salaries rather than a distribution of profits, on which the corporation would then have to pay a full income tax, and the recipients have to pay another tax by way of dividend. Now in my practice I see it time and time again with respect to closely held corporations. People draw salaries
far beyond the amount to which they are normally entitled and
255 the payment of salaries is merely a means by which profits are drawn from the company.

Now, with respect to this——

The COURT. But add to that this fact, here are these delegates, whose obligation is 100 per cent loyalty to their union. They owed absolute 100 per cent loyalty to the union, and yet they turn around and they go into the employment of a trading concern that has a conflicting interest, and they were warned of that at the injunction trial. The injunction itself was a warning, and on the basis of that injunction Charles Herbert sold his stock and got rid of it, accord-

ing to his testimony, which I accepted, and that is the only reason he was not punished also on that count. He had gotten out of it, and that let him out.

Mr. KAUFMAN. When I summarized the testimony at the conclusion of the trial, when your Honor was good enough to hear me, I said to you definitely that as a matter of ethics I did not attempt to justify it; I do not attempt to do so now; but if you take the legal side, no member of the Schochtim Union complained that those delegates were not 100 per cent loyal.

The COURT. No, no; but what I am thinking about is these innocent consumers, the public, that is what I am thinking of, because you are piling on the backs of consumers all this extra cost. Those are the people I am thinking about. They are the people who are chiefly concerned, and that is what impressed me, and the defendants got the warning put in explicit language at the injunction trial, and this clause was put into the decree in specific terms, enjoining the
256 use of these delegates by the feed companies to coerce people to buy, and yet they went right straight ahead, paid no attention to it.

Mr. KAUFMAN. If your Honor please, these men, with respect to the feed corporation, were at the time under a misapprehension——

The COURT. How could they be? Charles Herbert was not. He quit. He interpreted it properly.

Mr. KAUFMAN. Not in connection with the decree. It had nothing to do with it.

The COURT. He sold out after. Well, it created a doubt, and I let him out. Perhaps I made a mistake.

Mr. KAUFMAN. I was glad your Honor did let him out; but the sale of the stock was in connection with some difficulty that he had in Brooklyn and he needed money at the time, and that is, I understand, the reason for the selling of his stock. I am glad he was let out; but, your Honor, that was the reason. The best proof, your Honor, of the fact that these men did not attempt to hide connection with the feed corporation is that their names were plastered all over the books, and checks were drawn in a proper, business-like way in connection with the handling of that transaction. If graft, or something else, was intended, that certainly is not the method that would have been adopted for the handling of that business. That is almost as complete an answer as your Honor's premise that it must be graft because the company charged higher prices to marketmen with whom the members constantly did business.
257 Now if your Honor will take either one of those premises and——

The COURT. No; graft, even if they did not raise prices actually, although of course if they didn't raise the prices there would not be the imposition on the consumer that there was, if they hadn't raised the prices, but the very fact that a delegate whose loyalty is to the members of the union should go in there and put himself in a position away out of contact with his duties towards his union, he is

forcing these marketmen to buy from a corporation of which he is a stockholder. Now that is wrong.

Mr. KAUFMAN. Now, if your Honor please, as to the ethical side, I totally agree with you. I respect your conclusions in the entire case, although with respect to many phases I do not agree with it. But looking at it as a practical situation, I am certain your Honor felt a whole lot worse about this case three months ago than you do today, and in the heat of the conclusion of the case, when everyone was under great stress, your Honor came to a conclusion without regard to the personal element in this case, and that conclusion was that Weiner should serve two years and six months, to run concurrently with it.

Now we are up against a difficult legal problem to which none of us have an answer, and I think we should attempt to work out a practical solution of it. I think the most practical solution would be to give to the Government a greater hold on the defendant than was originally intended, and that is to suspend the sentence with respect to that item.

Mr. RICE. In answer to Mr. Kaufman's suggestion that we
258 take a broader decree from the defendant Weiner, I want to point out that the whole basis of this prosecution was for violation of a decree then in existence. We found that this defendant does not obey decrees. What would be the purpose of imposing another decree enjoining him from participating in this industry?

I might suggest also, your Honor, there are authorities who think that a decree which concerns itself with matters over which this court could not take jurisdiction would be null and void. The decree that has now been entered has been sustained by the United States Supreme Court on all points, but a decree in the form suggested by Mr. Kaufman might be a nullity, despite the consent of the defendant.

Mr. KAUFMAN. Do you mean, Mr. Rice, you don't like the offer I made?

Mr. RICE. Where the court has absolutely no jurisdiction, then the consent of the defendant is null and void, and no contempt prosecution could be predicated on such a decree.

Now, I am not stating that such a decree would be null and void, but at all events it would not be of any practical value, because we have an effective decree today. This defendant violated that decree and what we want now is punishment which will teach this defendant a lesson and teach other people who may be inclined to abuse this industry or any other industry as a matter of law.

Now, your Honor has pointed out that Charles Herbert, after the decree was entered, sold his stock in the Metropolitan Feed
259 Corporation, and there is testimony that he did sell that stock for $4,500, the exact amount he put in for that stock, which was netting him an income of $7,800 a year, yet Mr. Kaufman suggested he sold that stock for $4,500 in order to get money with which to defend himself in the prosecution in Brooklyn. Now that cannot

possibly be true, because Charles Herbert himself testified that he was receiving $150 a month after he sold his shares of stock; as payment for the purchase of that stock he did not get a lump sum of $4,500. He was continuing to get the exact amount of the returns he previously had gotten, namely, $150 a week.

The COURT. Well, now, I happen to know Charles Herbert's situation, although at the time that he was found guilty I had never heard of it, but he called on one of the judges of this court in respect to the sale of that stock and was told about that feature. So I did not know anything about it. So you need not bother about Charles Herbert any more.

Mr. RICE. Mr. Kaufman has suggested that members of the labor union were not complaining against the activities of their delegates. Now your Honor has had sufficient experience with people in this industry to know that no member of that labor union, the Schochtim Union, or no member of Local 167, would dare complain against the activities of their delegates.

Now, we have been advised time and again of people being thrown bodily out of those two labor unions because of protest meetings.

Mr. KAUFMAN. That is totally unfair, your Honor.

260 The COURT. Mr. Rice, do not run off the subject matter. I have brought you down here for two questions, and I think if any of you can give me additional help on those questions as to the power of the court to make the sentences under the same information, one on a felony and one on a misdemeanor, to require them to be served in the same prison, not a different prison, and yet make them concurrent, it will help me a lot on the question of my indisposition to adopt the method that Mr. Kaufman has asked me to adopt, to accomplish the thing which I told you at the time I was willing to accomplish if it could be made lawful. That is the important part of it, of convincing me of the legal question. I will stand by what I said then if I can be convinced that it can be done lawfully, I am willing to do it.

Mr. RICE. I would like to correct one impression Mr. Kaufman has created in respect to that subject. Your Honor did not say you desired to have the sentences run concurrently.

The COURT. I understand what I said. You need not bother to tell me that.

Mr. KAUFMAN. I am sure your Honor does not accuse me of misquoting you.

Mr. RICE. I don't suggest that.

The COURT. I know.

Mr. RICE. I know what your Honor said that was pertinent

261 to your Honor's discussion: "Insofar as it is lawful I should be willing to arrange by the judgment that the six months' sentence shall run concurrently with the two years' sentence. Upon that question parties may be heard and the time of the court extended."

The COURT. And you come here and all you do is to tell me what somebody else thinks. No reference to the statute or to the reasoning by which such conclusion could be reached. You told me that some learned gentleman in Washington and some learned gentleman in the District Attorney's office thinks so, but you don't enable me to consider it. I should be glad to consider it.

Mr. RICE. I should like your Honor to look at the Thompson case.

The COURT. I am going to read that, so you need not call it to my attention.

Mr. RICE. I am sure your Honor does not sustain it.

The COURT. My understanding is that there is no court decision on it. Therefore, I want help so there can be a court decision on it. Can either or both of you let me have additional material? Certainly by six o'clock I would like to have it, or earlier, if possible, so that I can examine that legal question and then if Mr. Kaufman cares to make inquiry of the Parole Board, so as to get the facts exactly, or to corroborate what the Government has found out on its inquiry, so there will be no mistake on it, I will be glad. I don't charge anyone with not getting the exact facts. There may be
262 a mistake. I will hear you gentlemen further tomorrow morning at ten-thirty in this courtroom.

(Adjourned to Tuesday, June 6, 1934, 10:30 a. m.)

New York, June 5, 1934, 10:30 a. m. Met pursuant to adjournment.

The COURT. I have received an additional letter from Dr. Albee, dated June 4th. That letter, as in the case of the letters I had yesterday, will be placed in the files. Anything further?

Mr. RICE. No.

Mr. KAUFMAN. I have not been able to find anything further on the question we were discussing yesterday, but it does seem to me that the exact situation will be under 753 F of the Code, and the Court can either designate a place for the service of the six months' sentence with a direction that the two sentences run concurrently or in the alternative to extend the six months sentence——

The COURT. What does Section 753–F say?

Mr. KAUFMAN. "753–F. All persons convicted of an offense against the United States shall be committed for such terms of imprisonment and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States, or his authorized representative, who shall designate places of confinement
263 where the sentences of all such persons shall be served. The Attorney General may designate any available, suitable, and proper institutions whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which convicted. The Attorney General is also authorized to order the transfer of any person held under authority of any United States statute from one institution to another if, in his judgment, it shall be for the well being of the prisoner or relieve overcrowded or

unhealthful conditions in the institutions where such prisoner is confined, or for other reasons."

Now, it seems to me under the provisions of the statute there the court in its judgment makes it explicit that it is the intention of the court that the person shall serve the maximum sentence of two years, or whatever your Honor will impose; but the Attorney General will attend to that direction, provided the six months' sentence shall not be served in the House of Detention; or, in the alternative, to take off the six months' sentence and provide both sentences shall run consecutively. The difficulty is the defendant goes into one prison and by the time he adjusts himself to that situation he is taken to another prison and has to again adjust himself to another situation. From the humane standpoint that is impracticable. May I also suggest that it is clear the court cannot impose a six months' sentence in a penitentiary, because the statute intends to protect the defendant from the stigma of serving six months in the penitentiary, and provides sentence in a penitentiary shall not be less than a year and a day. The purpose of the statute is to give to a particular defendant a
264 privilege that does not exist in this case by reason of the fact that he is already serving a six months' sentence in a penitentiary.

Mr. RICE. That argument might appeal to one's logic, were not it for the fact that the conviction of two years is on two counts entirely independent and separate from the conviction of six months on a third count. Now, let us assume that the Circuit Court of Appeals should reverse the District Attorney as to the conviction on counts 5 and 6 so that there is no two years' sentence to the penitentiary. Then all that would remain would be this court's sentence to six months in the penitentiary. Under these circumstances I think it is perfectly clear under the statute and under the judicial decisions that a sentence of six months in the penitentiary would be an invalid sentence—utterly void.

Now, the paragraph of the Code referred to by Mr. Kaufman, 753–F, is obviously an amendment to Section 753, which provides for the establishment of the Bureau of Prisons in the Department of Justice and provides money for that purpose. 753–F relates only to the power of the Attorney General as exercised through the Director of the Prison Bureau to handle prisoners who are in its custody after sentence by the court. 753–F does not increase the power of the District Attorney. It does not change the power to sentence a man from one type of institution. The duty of the court under the law, as it stands, is to designate the type of institution rather than a specific institution, and under other provisions of the Code the Attorney General has the power to designate a particular institution where the sentence shall be served. The Attorney General cannot
265 designate the character of the institution. That is within the exclusive power of the District Court, and those powers are specifically defined by the sections of the Code that we have referred to in our brief.

I think it is perfectly clear under the case of in re Mills and the two other Supreme Court cases we have cited as well as the cases in the Sixth Circuit and in the Eighth Circuit, that a prison term of six months cannot be served in a penitentiary. As we pointed out in our brief, there is continuity of authority as to whether a sentence of exactly one year can be served in a penitentiary. One circuit has held that a sentence of exactly one year can be served in a penitentiary; the other Circuit Court takes the view that it must be for a year and a day, but both courts agree under the statute that a sentence of less than one year cannot be served in a penitentiary.

The Court. Assuming that the conclusion should be reached that the ends of justice would be met by making some revision of the sentence so that the total period in prison should not exceed two years, as I indicated at the time of imposing the original sentence I was then willing to consider, there are two separate methods by which the end may be accomplished.

One of these would be to reduce the length of the two years' sentence from two years to eighteen months and to require that the eighteen months and the six months sentences be served consecutively.

The other method would be to impose both the two year
266 sentence and the six months' sentence and provide for the suspension of the execution of the six months' sentence.

A third alternative, if available, would be to provide that the two-year sentence and the six months' sentence run concurrently. As I said at the time of the trial, I then had doubt as to whether a provision of that character in the judgment would be lawful.

I have examined your briefs and considered the authorities. It does not seem to me that the conclusion to be reached is so clear that there is not room for debate. On the other hand, I am impressed with the great weight of argument against the existence of power on the part of the court to provide for the concurrent running of sentences on counts in the same information on one of which there has been a conviction of a felony and on the other of which there has been a conviction of a misdemeanor; or what is equivalent to the same thing in a contempt proceeding, where the sentence on one count exceeds one year and on the other is less.

It is plain that the statutes of the United States prohibit the court from requiring sentence on a misdemeanor to be served in a penitentiary. That statutory provision, as I read it, is not modified or influenced by Section 753–F of Title 18 of the United States Code, which vests in the Attorney General certain authority to designate a place for a sentence to be served. The statute which prohibits the court likewise prohibits the Attorney General from causing one convicted of a misdemeanor to serve the sentence for that offense in a penitentiary.

That being clear, the only available argument, to my mind
267 favors the corollary proposition. As it impresses me, if the court cannot impose a sentence for a misdemeanor to be served

in the penitentiary, then it cannot further provide that the serving of that sentence shall run concurrently with a sentence for an offense which is a felony and which must be served in a penitentiary.

It seems to me, therefore, that this third alternative which I have been discussing, to provide for concurrent serving of the two sentences, is not available. At any rate, doubt as to whether the court has the power would render it unavailable. Certainly the third method should not be adopted in a case of this kind where there are two other methods which are open to consideration—for either of them, as a practical matter, can be adopted to subserve the ends of justice. I shall, therefore, not impose sentence or modify the sentence already imposed so that the sentence on count 4 shall run concurrently with the sentence on counts 5 and 6.

There remain to be considered, first, whether there ought to be any change; secondly, if so, what it shall be; and, thirdly, if that be determined favorably to the defendant, the next inquiry is what is the device by which it can properly or best be worked out.

I am fully conscious, I believe, of the suffering that falls upon a convicted defendant; the humiliation, the separation from family, the deprivation of liberty. Nevertheless the laws of the United States provide for those things. Otherwise we might just as well tear up the criminal statutes. Nobody to this day has been wise enough to invent an alternate method of punishment for violation of the criminal law. Even though there be advocates of changes with
268 respect to what is sometimes called punishment, those changes have not been embodied in the laws of the United States; and, as I conceive it, whatever be the range of jurisdiction or power or authority vested in the judges, or what we sometimes refer to as discretion, the very existence of the laws defining offenses and prescribing the range of punishment therefor forces an inexorable duty upon the court to impose sentences and to impose sentences of such character that they will chiefly serve the interests of the community. In the exercise of that discretion, as I see it, there is also the mandate, the duty of the court, insofar as he can within the limitations of his power, to temper justice with mercy; to take into account, as nearly as he can ascertain, the interests of the individual and the interests of those who are near to him and dependent upon him.

Nevertheless, it is important to remember, as matter of practical experience, that where a defendant comes before a court for sentence and is imprisoned, he does not suffer less than innocent people, such as wives and children, mothers and fathers, sisters and brothers. So that while the court ought to take into account all matters, including those of family relations, yet there is an equal duty in connection with those facts, and, indeed, an inescapable duty, to impose such a sentence as the court believes will assist in deterring the commission of other like offenses—not alone by the individual defendant but by others as well—or will at least have a deterrent effect. That, I believe, is the more important duty.

What are the circumstances brought forward here for the consideration of the court in the request now made to temper this sentence previously imposed?

269 Chiefly I am asked to reduce that sentence because of the charitable, kindly activities in which the defendant has been engaged.

A number of people have called on me in my chambers. I have also received a great many letters. I have respect for the sincerity and for the feelings of those who appealed on behalf of the defendant. However, it was obvious that those who called on me, and with whom I have talked, were in complete ignorance about this case. They knew nothing about it.

I had a call also from a delegation of labor union members—not particularly in behalf of Weiner, but principally in behalf of other defendants. Their argument went not to the nature of the acts or the courses of conduct of those who had served as representatives of the labor unions, but rather to the inconvenience or the disadvantages that they themselves would suffer, if the law were enforced in the way prescribed by the statutes, through imposition of sentences which must be served by the defendants. That, as I conceive it, is a totally inadmissible argument. I told them frankly I would not be influenced by it. Every man stands before the law on the same basis. I should not depart from that.

The defendant Weiner having urged, or in his behalf it having been urged, that there be a modification of the sentence because of his expenditures in behalf of charitable causes, himself invited an inquiry into his financial dealings.

According to the proof taken yesterday, as I understand it, relating to the years 1929, 1930, and 1931, the contributions of the defendant to those good causes ran to around $4,000 a year—and I

270 may say that a very large proportion of the appeals which have come to me in his behalf have come from those who were helped or were able to help others by his contributions.

One striking fact in the testimony of the defendant yesterday, however, was his inability to give me any clear explanation about one thing. His charitable contributions, according to my understanding of the statement of a gentleman of high standing who called on me last week in my chambers, included one which ran to around $1,200 a year for the assistance of a youth in procuring a medical education. Yet the defendant was unable to recall any such incident. The sums given annually, according to himself, in round figures ran up to $4,000, whether with or without the help of the medical student I am not sure.

But I accept the statement, as made by the defendant, that he has been giving $4,000 a year to good causes during 1929, 1930, and 1931. As I have said, that invites inquiry into where he got the money and under what circumstances.

The proof is that the defendant's yearly net income from salary as a delegate of the union was $3,900 for 1929, 1930, and 1931. He

tells us that his total annual income for those years was $25,000. That leaves in round figures $21,000 a year of which the sources are to be accounted for. Where did he get it? His explanation is that it came from two sources: $7,800 came from the poultry feed company, in which he says he was a stockholder, and $13,000 came from gambling.

Let us examine these claims to see what just weight they are entitled to.

271 The testimony at the trial showed that the feed company employed three union delegates and paid each of them $150 a week—this defendant being one of them—and that the feed company was continuously engaged in selling poultry feed to establishments which employed union members who were supervised by or whose relations with their employees were largely under the guidance of these identical delegates. That was outrageous. Each of those delegates got twice as much as the president of the company, who gave his whole time to the work of the company. The proof is that for the $150 a week paid the delegates the service rendered by them was trifling—if anything. Those were plainly excessive payments. Moreover, the prices for poultry feed paid by the marketmen to the company which had the delegates on its staff were higher than those at which they could buy from other feed concerns. Both the exhorbitant salaries paid the delegates and the increased prices exacted for poultry feed had the effect of imposing additional burdens on the backs of the public, the consumers, the absent people, the people for whose protection and benefit laws are chiefly made. They are not vocal, they are not here to speak for themselves. They should be remembered.

Weiner, therefore, has done much to increase the expense of what is consumed by the community. He participated directly in rendering greater the hardship on the consumers because of the excessive salaries paid the delegates by the feed company. That is but a single illustration of what the evidence disclosed on the subject.

272 Although I did call attention at the injunction trial to graft among the unions, I did not then fully characterize the evil practice as it deserves. I cannot escape the conviction that the payments to the delegates by the feed company were graft. They cannot be jutsified, as was attempted, by calling them income upon an investment in stock of the feed company. According to Weiner, he had $4,500 of stock which cost him $4,500. According to him also, he got $7,800 income annually on that investment. That explanation is absurd.

What was the occasion to employ the delegates to make sales of feed for the company in which they took stock? By the acceptance of those positions with the company they put themselves ina position of inevitable temptation to use their power as delegates for their individual advantage. They created a conflict with their obligations to the unions. The consequent attitude of unfaithfulness was a detriment to the unions. It was likewise a detriment to the people of the

community. Warning was given at the injunction trial about this graft or about graft—though it may not have been very specific, because there was other evidence at that trial of different phases of graft.

The conclusion is inescapable that the interest of the unions demanded that there be freedom from graft, that there be faithfulness by delegates to the unions that there be no diminution of motives of loyalty that members of the unions be served. Accordingly for the sake of the unions as well as of the public, a provision was put into the injunction decree prohibiting the employment of these important officers or delegates to coerce people to buy from a particular feed company.

273 So it seems to me, and I am bound to say, that out of the large surplus with which the defendants supplied themselves, and out of which this defendant made these generous contributions to good causes, a considerable part at least was graft. I credit him with having used a substantial amount of that graft in doing good acts.

There is a balance of $13,000 to be accounted for by the defendant. Where did that come from? He said that it came from gambling.

Not only the law but human nature itself, which is inherent, permits weight to be given to the fact when a man has been convicted of burglary; one at least is put on his guard as to the statements a convicted burglar may make.

In addition to the defendant having served a term for burglary, there was a peculiarly observable thing in the testimony yesterday in his accounting for the annual income of $25,000 for the three years under consideration. There was no distinction as between the years as to the sources from which the extra $13,000 came. This struck me as remarkable. The regularity of the alleged inflow of so substantial an amount as $13,000 annually from so unsubstantial a source as gambling renders unbelievable the explanation of the means for securing an income.

There were other remarkable facts. They also must be taken into account in determining whether the statements of the defendant are true or not. Among these is this: there was a complete absence of any record or the production of any bank statement or other record to sustain the sources of his income.

274 Gentlemen, I am bound to say, after listening to the testimony of many types of people, that this claim of income from gambling is a standardized form of falsehood.

The Circuit Court of Appeals of this Circuit has had occasion quite recently to comment on this very type of testimony—with which trial judges are so familiar. While the cases before that court and now before this court were of different types, the effect was the same.

It is common experience in bankruptcy cases, where bankrupts are called on to explain what has become of their assets, that they say they lost them in gambling. In Matter of Hyman Abesbaum, in which the Circuit Court of Appeals handed down an opinion on April 30th of this year, the bankrupt endeavored to explain the disposition of

$12,000 in cash. As to the first $3,000 he said he had handed it over to his brother-in-law in payment of loans. There was no written evidence. He had no entries in his books and he could give no dates. He further claimed he had given a second $3,000 to his wife. Lastly, he said he had lost $6,000 when drunk and gambling at cards and dice. Judge Augustus Hand commented on this and on the frequency of such explanations. He added that "they contain little more than standardized forms of falsehood so often reiterated as to be neither credible nor interesting."

So that when we consider all the facts as to the generosity of the defendant—which I do not doubt—in helping out good causes, it seems to me, gentlemen, that the revelation of the sources of the
275 income of the defendant and the inherent nature of his offense carry the scales very far against him. They much more than offset the credit for doing good.

As I said at the trial, the offense dealt with in this court is entirely separate from that with which the State court dealt. This is so, although the facts may be said in a measure to be the same or to relate to the same set of circumstances.

I regard two years, the sentence under counts 5 and 6, as wholly warranted. The defendant's conduct was such that no injustice was done when a sentence of that length was imposed. For one who had committed the offense of which the defendant was convicted, it seems to me none too much for him to be incarcerated for two years.

The offense was important. It included compelling submission or attempting to compel submission through coercion and terrorizing by destruction of property and injury to person. And what for? What was brought out by the Government? It was in order to compel participation by the person upon whom the particular terrorizing was imposed in the use of a type of coop for his poultry which carried with it the requirement that consumers pay more for their poultry. When, as was established at the trial, a man can buy outright a coop at $1.53 to $1.65, there is no excuse for forcing him or seeking to force him to pay $1.00 for a single use of another coop. There is no excuse for compelling him to purchase from a particular seller at the higher price. The inferences are inescapable. They speak for themselves. And, as I have frequently said, the people who suffer are the consumers, the poor of the community; and even
276 worse than that the sufferers are people whose religious convictions require them to buy the type of food produced only, so far as I know, in establishments of the kind assaulted.

As I intimated to you yesterday—and I have reflected on it since—I feel that it would be almost a reflection on the administration of the law, in circumstances such as are present here, to suspend execution of the six months' sentence when the offense of which the defendant was convicted, to all intents and purposes was graft. I am not willing to suspend execution of a sentence for an offense like that.

Nevertheless, the law is not vindictive. All that is required in the administration of the law is, that the punishment be sufficient

to constitute a deterrent of the one convicted and of others from committing like offenses.

After my talk with you, and in line with my general feeling at the time I imposed sentence, I would be willing to modify the sentence so that the whole time to be served shall not exceed two years. That I could do lawfully and without violence to what I conceive to be my duty. Accordingly, I shall reduce the sentence as announced at the time from two years in the penitentiary to eighteen months, so that the sentence of the court shall be——

Mr. RICE. Before your Honor amends the sentence, may I make an alternative suggestion. If it is your Honor's view that the aggregate sentence shall be two years instead of two years and six months, then I should like to suggest that the amendment be in this form,

277 that the two years' sentence to the penitentiary on counts 5 and 6 be retained, and that if the defendant desires that the aggregate of his sentence be reduced to two years, that the sentence on count 4 be increased to one year and a day to be served concurrently with the two-year sentence under counts 5 and 6. That will have a very practical bearing in the event of a reversal on counts 5 and 6 in the appellate court. If your Honor should reduce the two-year sentence on counts 5 and 6 and if there should be a reversal on count 4, then the aggregate sentence of this defendant that he would serve would be two years.

Now your Honor has expressed the view that two years is not excessive under the circumstances and I recommend to your Honor that you can reach that result by amending the sentence under count 4 in the manner suggested. I submit that there would be no illegality in amending the sentence in that manner provided that the defendant consents to such modification. The defendant is applying to this court for a amodification, and if he does not wish to submit to the condition that the sentence on count 4 be increased to a year and a day, then, of course, this court can deny his application, and I submit that will reach a just result, and I also wish to call your Honor's attention again to the fact that Weiner will be allowed a total of six months off on his two-year sentence for good behavior and a total of thirty days off under his sentence of six months under count 4.

Under the present law, as stated in 18 U. S. Code, Section 710, the allowance for good behavior on a two-year sentence to the penitentiary is at a greater rate than the allowance on a six-months sentence to a jail. Now, then, if your Honor should decrease

278 the two-year sentence to eighteen months, the proportionate allowances will change.

The COURT. I would not be willing.

Mr. KAUFMAN. I will adopt Mr. Rice's suggestion. It doesn't make any difference so far as we are concerned. I think that would be one practical way of handling the situation. It would relieve the defendant from serving eighteen months in the penitentiary and then getting out and adjusting himself to a new atmosphere. If he has two

years, and a year and a day both to be served concurrently, he knows he has so much time at one place and at the expiration of it he will know he can breathe the air of freedom rather than adjusting himself and in going to another place.

The COURT. What has the defendant to say about this? You may explain it to him. I wish to have on the record what the defendant says and to see that he wholly understands it.

(Conference between Mr. Kaufman and the defendant Weiner.)

Mr. KAUFMAN. I have explained the situation to the defendant and your Honor may inquire from him as to his understanding of it.

The COURT. Very well, let the defendant come forward. Has your counsel explained fully the question on which we are now engaged? You understand that the court has reached the conclusion that it is willing that the entire punishment that is required of you for
279 both offenses—for one of those sentences as it now stands you are to serve two years and the other you have been sentenced to six months, making a total of two and a half years—shall be reduced to two years? Do you understand that?

Defendant WEINER. Yes.

The COURT. And the question is as to a legal method by which that can be accomplished. I have in substance expressed my willingness to reduce the two-year sentence to eighteen months and allow the six months' sentence to stand, so that the eighteen months and the six months will make a total of two years; but under the law the eighteen months' sentence will have to be served in a penitentiary and the six months' sentence in the House of Detention in this city. Do you understand that?

Defendant WEINER. Yes, sir.

The COURT. And your counsel on your behalf has therefore stated that he will consent to an alternative method that Mr. Rice, the Attorney General, has brought to the attention of the court; namely, that by increasing your sentence on count 4, so that instead of its being on that count six months in the House of Detention it shall become a sentence of one year and one day at a penitentiary, the two sentences can run concurrently, and that then provision be made that the two-year sentence and the sentence of a year and a day shall run concurrently. Your counsel suggested that this might be more acceptable to you. What have you to say to that?

Defendant WEINER. Yes; I would rather be in one place, your Honor.

280 The COURT. The advantage, as pointed out by your counsel, would be that the service would be in one place and you would not have to be transferred from one prison to another in the event your appeal is not successful.

Mr. RICE. Before your Honor sentences, I should like to say one word more. The docket entry in this case shows that a sentence of two years was imposed on count 5 and a sentence of two years on

count 6, each of them to run concurrently. We are advised that the safer practice is to substantially provide a separate sentence on each count and then provide that such sentences shall run concurrently. In fact, there is some dictum in the Gompers case, suggesting that unless a sentence in a criminal contempt case was imposed in that fashion, the sentence may be defective. However, I think the whole question is so doubtful as to warrant other docket entries. The docket entries are not precisely in accord with the statements made by your Honor at the time of sentence.

The COURT. Call it to the attention of Mr. Kaufman.

(To the Clerk): Have you the docket entries here?

The CLERK. Yes, your Honor. (Hands same to Court.)

Mr. KAUFMAN. Paragraphs 5 and 6 constitute one count and were so reported at the time of trial.

(Docket entry reads as follows:)

"Joseph Weiner, on Paragraph 4, 6 months at Detention Headquarters, N. Y. C.

"On Paragraphs 5 and 6, two years at a place of
281 confinement to be designated by the Attorney General.

"Sentences are to run concurrently and to commence upon release of defendant from N. Y. Penitentiary, Welfare Island, N. Y. Term of court is extended until after the decision of the C. C. A. of N. Y."

Mr. RICE. There are a great number of cases which state that if the aggregate sentence imposed by the Court is in excess of what the Court could have imposed on any one count, then the sentence will stand, but at the same time there is the dictum in the case of Bucks Stove and Range Company v. Gompers, which states that if the court in a criminal contempt case does not state specifically that the sentence is to operate as to specific counts, then the sentence may be defective.

The COURT. This is an awful late date to bring up this question. Send for the Gompers case and let me look at it.

Mr. KAUFMAN. I think this can easily be cleared up, if the sentences on Paragraphs 4, 5, and 6 are to run concurrently.

The COURT. Is that agreeable?

Mr. KAUFMAN. It is agreeable to me.

The COURT. Is that agreeable to you Mr. Rice?

Mr. RICE. I do not understand what that means. Is there
282 to be a single two-year sentence on the charges contained in Paragraphs 5 and 6, and a sentence of one year and a day on count 4, and then a provision that the one-year sentence shall run concurrently with the two-year sentence?

Mr. KAUFMAN. One year and a day.

The COURT. What is your response?

Mr. KAUFMAN. My understanding is a year and a day on Paragraph 4, and a two-year sentence on Paragraphs 5 and 6 which shall run concurrently.

The COURT. From the statement by the defendant Weiner it is clear that he desires a change made from the sentence of six months in the House of Detention, so that the sentence on Count 4 shall be a year and a day in the penitentiary. Am I correct in understanding you to that effect?

Defendant WEINER. Yes.

The COURT. Since the defendant gave his assent to this change, after conferring with his counsel, Mr. Rice has called my attention to this entry on the back of the information made by the Clerk on March 29, 1934, the day sentence was imposed on this defendant. As recorded on the back of the information, the sentence is as follows:

"Joseph Weiner, on Paragraph 4, 6 months at Detention Headquarters, N. Y. C.

"On Paragraphs 5 and 6, two years at a place of confinement to be designated by the Attorney-General.

283 "Sentences are to run concurrently and to commence upon release of defendant from N. Y. Penitentiary, Welfare Island, N. Y. Term of court is extended until after the decision of the C. C. A. of New York."

The record as here made by the endorsement on the information is an incorrect recital of the sentence as I imposed it at that time. I did not at that time provide that the six months' sentence should run concurrently with the two-year sentence. I did not at that time extend the terms of the court until after the decision of the C. C. A. of New York. What I did do at that time was to say what is set out in the memorandum opinion of that day which I signed and filed as part of the records of this court. As that memorandum will show, I stated, in substance, that I would be willing to give consideration to providing that the six-months sentence and the two-year sentence should run concurrently in the event counsel could persuade me that it was valid for me so to provide. I further at that time said in substance that the term of the court would be extended until thirty days after the decision of the Court of Appeals of the State of New York for the purpose of entertaining the application with respect to the sentence. It is pursuant to the latter reservation in regard to the sentence that the present hearing has been held. I did not at the time of imposing sentence on March 29th impose separate sentences on counts 5 and 6 of two years each to run concurrently. On the contrary, I treated counts 5 and 6 as constituting a single charge as they both related to the same set of facts, and, as I conceived it, there were merely different parts of the injunction order described in the two separately numbered counts, count 5 referring to one part

284 of the order and count 6 to another part of the order. It seemed to me then, as it seems to me now, that both counts relate to the same matter and if either count was a violation of the injunction order; irrespective of which portion it was, that it was an offense. Moreover, it seemed to me unjust to the defendant to impose separate sentences, one on count 5 and one on count 6, to be

count 6, each of them to run concurrently. We are advised that the safer practice is to substantially provide a separate sentence on each count and then provide that such sentences shall run concurrently. In fact, there is some dictum in the Gompers case, suggesting that unless a sentence in a criminal contempt case was imposed in that fashion, the sentence may be defective. However, I think the whole question is so doubtful as to warrant other docket entries. The docket entries are not precisely in accord with the statements made by your Honor at the time of sentence.

The COURT. Call it to the attention of Mr. Kaufman.

(To the Clerk): Have you the docket entries here?

The CLERK. Yes, your Honor. (Hands same to Court.)

Mr. KAUFMAN. Paragraphs 5 and 6 constitute one count and were so reported at the time of trial.

(Docket entry reads as follows:)

"Joseph Weiner, on Paragraph 4, 6 months at Detention Headquarters, N. Y. C.

"On Paragraphs 5 and 6, two years at a place of
281 confinement to be designated by the Attorney General.

"Sentences are to run concurrently and to commence upon release of defendant from N. Y. Penitentiary, Welfare Island, N. Y. Term of court is extended until after the decision of the C. C. A. of N. Y."

Mr. RICE. There are a great number of cases which state that if the aggregate sentence imposed by the Court is in excess of what the Court could have imposed on any one count, then the sentence will stand, but at the same time there is the dictum in the case of Bucks Stove and Range Company v. Gompers, which states that if the court in a criminal contempt case does not state specifically that the sentence is to operate as to specific counts, then the sentence may be defective.

The COURT. This is an awful late date to bring up this question. Send for the Gompers case and let me look at it.

Mr. KAUFMAN. I think this can easily be cleared up, if the sentences on Paragraphs 4, 5, and 6 are to run concurrently.

The COURT. Is that agreeable?

Mr. KAUFMAN. It is agreeable to me.

The COURT. Is that agreeable to you Mr. Rice?

Mr. RICE. I do not understand what that means. Is there
282 to be a single two-year sentence on the charges contained in Paragraphs 5 and 6, and a sentence of one year and a day on count 4, and then a provision that the one-year sentence shall run concurrently with the two-year sentence?

Mr. KAUFMAN. One year and a day.

The COURT. What is your response?

Mr. KAUFMAN. My understanding is a year and a day on Paragraph 4, and a two-year sentence on Paragraphs 5 and 6 which shall run concurrently.

The COURT. From the statement by the defendant Weiner it is clear that he desires a change made from the sentence of six months in the House of Detention, so that the sentence on Count 4 shall be a year and a day in the penitentiary. Am I correct in understanding you to that effect?

Defendant WEINER. Yes.

The COURT. Since the defendant gave his assent to this change, after conferring with his counsel, Mr. Rice has called my attention to this entry on the back of the information made by the Clerk on March 29, 1934, the day sentence was imposed on this defendant. As recorded on the back of the information, the sentence is as follows:

"Joseph Weiner, on Paragraph 4, 6 months at Detention Headquarters, N. Y. C.

"On Paragraphs 5 and 6, two years at a place of confinement to be designated by the Attorney-General.

283 "Sentences are to run concurrently and to commence upon release of defendant from N. Y. Penitentiary, Welfare Island, N. Y. Term of court is extended until after the decision of the C. C. A. of New York."

The record as here made by the endorsement on the information is an incorrect recital of the sentence as I imposed it at that time. I did not at that time provide that the six months' sentence should run concurrently with the two-year sentence. I did not at that time extend the terms of the court until after the decision of the C. C. A. of New York. What I did do at that time was to say what is set out in the memorandum opinion of that day which I signed and filed as part of the records of this court. As that memorandum will show, I stated, in substance, that I would be willing to give consideration to providing that the six-months sentence and the two-year sentence should run concurrently in the event counsel could persuade me that it was valid for me so to provide. I further at that time said in substance that the term of the court would be extended until thirty days after the decision of the Court of Appeals of the State of New York for the purpose of entertaining the application with respect to the sentence. It is pursuant to the latter reservation in regard to the sentence that the present hearing has been held. I did not at the time of imposing sentence on March 29th impose separate sentences on counts 5 and 6 of two years each to run concurrently. On the contrary, I treated counts 5 and 6 as constituting a single charge as they both related to the same set of facts, and, as I conceived it, there were merely different parts of the injunction order described in the two separately numbered counts, count 5 referring to one part

284 of the order and count 6 to another part of the order. It seemed to me then, as it seems to me now, that both counts relate to the same matter and if either count was a violation of the injunction order, irrespective of which portion it was, that it was an offense. Moreover, it seemed to me unjust to the defendant to impose separate sentences, one on count 5 and one on count 6, to be

served consecutively, because both counts related to the same transactions.

The corrections that I have indicated in the docket entry on the back of the original information may be made by the Clerk.

In pursuance of what I have said here earlier today, and to the consent given by the defendant personally, after being advised by his counsel, the sentence of the court will be this as to the defendant Weiner:

Upon the offense described in paragraphs 5 and 6 of the information, two years in the penitentiary, the service of the two-year sentence to begin when the defendant is released from the sentence he is now serving under conviction in the State Court.

Upon the offense described in paragraph 4, the sentence of the court is one year and a day in the penitentiary, the sentence on paragraph 4 to run concurrently with the sentence on paragraphs 5 and 6.

Mr. KAUFMAN. May I have the record show that by the consent of the defendant Weiner to the modification of sentence that that is not a waiver of his right to appeal on any ground except that he waives any right to claim that the court had no power to change the
285 sentence in the manner in which the Court did change it. That is understood.

The COURT. Yes.

Mr. KAUFMAN. There should be filed the original notice of motion that was returnable in Room 235 before your Honor, and this is a hearing on that motion.

286 In United States District Court Middle District of Pennsylvania

No. 69 Habeas Corpus. May term, 1935

UNITED STATES OF AMERICA EX REL. JOSEPH WEINER, PETITIONER

vs.

HENRY C. HILL, WARDEN OF THE UNITED STATES NORTHEASTERN PENITENTIARY, RESPONDENT

Petition for Writ of Habeas Corpus

Opinion

This is a petition for a writ of habeas corpus by Joseph Weiner, an inmate of the United States Northeastern Penitentiary, at Lewisburg, Pennsylvania. The writ was issued and the hearing held, after which arguments were made by counsel on the respective sides and written briefs filed.

In a suit in equity entitled United States of America v. The Greater New York Live Poultry Chamber of Commerce et al., Equity No. 52–30, brought by the United States under the provisions of the

Sherman Anti-trust Act, the District Court for the Southern District of New York entered a decree enjoining 99 defendants from conspiring to restrain trade in live poultry in Greater New York, and especially enjoining them from doing certain enumerated acts.
287 The offenses committed by the defendants and enjoined by the Court included criminal offenses or acts under the Sherman Anti-trust Act.

Subsequently in a case entitled United States of America, Complainant and Petitioner vs. Joseph Weiner, the petitioner herein, and other defendants, to Criminal No. C95–434, on petition of the United States Attorney for the Southern District of New York, a rule was granted on Joseph Weiner, the petitioner herein and other defendants, to show cause why the defendants should not be adjudged in contempt for having violated the injunction granted in the said case, entitled United States of America vs. The Greater New York Live Poultry Chamber of Commerce et al. and be adjudged and punished for same; and an information charging criminal contempt against Joseph Weiner et al. was filed.

The court heard the case without a jury; a jury trial having been waived by the parties. The petitioner was found guilty of contempt and sentence was imposed on Joseph Weiner March 29, 1934, which was modified June 5, 1934, as follows: to one year and one day on paragraph 4 of the information; to two years on paragraph 5 of the information; and to two years on paragraph 6 of the information; sentences on paragraphs 4, 5, and 6 to run concurrently, making a total actual term of service of two years.

The petitioner contends that the proceeding in this case for contempt was properly and lawfully conducted under the provisions of Section 21 and Section 22 of the Clayton Act, 28 U. S. C. 386 and 387, and that under this Act, Section 22, the maximum term of imprisonment which could have been imposed upon him for con-
288 tempt was six months and that since he has already served six months in the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, he is now entitled to be discharged. The respondent contends that the Clayton Act does not apply in this case since Section 24 of that Act excepts contempts "* * * committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States * * *"; that this exception takes the proceeding and punishment out of the provisions of Sections 21 and 22 of the Clayton Act, leaving the procedure for the trial of the charge of contempt and the punishment thereof to Section 268 of the Judicial Code, 28 U. S. C. 385, which authorizes the Federal Courts to punish contempts by fine or imprisonment at the discretion of the Court.

Section 21 of the Clayton Act, 28 U. S. C. 386, provides as follows: "Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United

States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided."

Section 22 of the Clayton Act, 28 U. S. C. 387, provides: "Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer
289 on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged a trial shall be directed at a time and place fixed by the court. * * * In all cases within the purview of sections 381 to 383, 386 to 390 of this title, section 412 of Title 18, section 52 of Title 29 and sections 12 to 27 of Title 15, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected or summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment or both, in the discretion of the court. Such fine shall be paid
290 to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. * * *"

The respondent contends that under Section 24 of the Clayton Act the procedure and punishment under Sections 21 and 22 of the Clayton Act do not relate to or control this case, since the contempt committed was entered in a suit or action brought or prosecuted in the name of the United States, but that Section 268 of the Judicial Code provides the procedure and punishment by giving the courts power to impose and administer all necessary oaths and to punish by fine or

imprisonment at the discretion of the court contempts of their authority.

But the exception made in section 24 of the Clayton Act relates to contempts committed in disobedience of any "lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name or on behalf of the United States", which indicates that the contempt intended is one committed in violation of an order or injunction in a civil suit or action brought or prosecuted in the name of or on behalf of the United States to restrain an act or acts not criminal, not offenses or crimes, but an act or acts wrong or injurious of a civil nature. Where the act or acts to be enjoined are wrongs or injuries of a civil and not of a criminal nature, a civil suit or action is brought and not a criminal action in the first instance. Here the original act or acts, of-
291 fenses against the Sherman Anti-trust Law, were criminal and not civil, and any suit to restrain such acts would be necessarily in the nature of criminal actions or suits and not civil actions or suits and the terms used in the exception of Section 24 of the Clayton Act indicate a civil action in form and substance for the redress or prevention of a civil wrong. It is clear, therefore, that the exception made in Section 24 of the Clayton Act does not relate to or control this case and does not take the proceeding or the punishment for the contempt here out of the provisions of the Clayton Act.

The procedure provided by Sections 21 and 22 of the Clayton Act was followed literally in the trial of the contempt charged against Weiner, including the jury trial which was waived, excepting as to punishment, as clearly indicated from the record, which shows that all the parties to this case, including the court, considered that the Clayton Act governed this case.

Furthermore, since the parties followed the procedure of Sections 21 and 22 of the Clayton Act and not the procedure of Section 268 of the Judicial Code, and the court tried the defendant according to these sections of the Clayton Act, the punishment must follow the Act under which the defendant, here the petitioner, was charged and tried, which provides that in no case shall such imprisonment exceed the term of six months.

Since an imprisonment of six months was the maximum term to which the petitioner could have been sentenced, and since he has served this period of imprisonment, he is now entitled to
292 release and his petition for release under the writ of habeas corpus must be granted.

And now, June 25, 1935, it is ordered that the petition for a writ of habeas corpus be, and the same hereby is, sustained, the writ of habeas corpus granted, and the petitioner, Joseph Weiner, discharged from the custody of Henry C. Hill, Warden of the United States Northeastern Penitentiary, at Lewisburg, Pennsylvania.

ALBERT W. JOHNSON,
U. S. District Judge.

In United States District Court

Order fixing bond

And now, to wit, June 25, 1935, the Court this day having rendered its opinion in the above entitled case, wherein it has ordered that the petitioner, Joseph Weiner, a prisoner at the United States Northeastern Penitentiary, be discharged from custody, and application having been made on behalf of the respondent for time to prepare an appeal without the prisoner being absolutely discharged and control of him lost

It is, therefore, ordered and decreed that the said Joseph Weiner shall be released by Henry C. Hill, Warden of the United States Northastern Penitentiary, upon the said Joseph Weiner furnishing a bond to be approved by the Court in the amount of Five Thousand Dollars ($5,000.00), conditioned that he will appear before this
293 court on Tuesday, July 2, 1935, at Lewisburg, at two o'clock p. m., to abide the further order of this Court, so that if an appeal has been filed by the respondent by that time, the Court may at that time make such further order as is necessary with reference to the filing of a recognizance by the said Joseph Weiner in connection with said appeal.

ALBERT W. JOHNSON,
U. S. District Judge.

In United States District Court

Petition for reargument

To the Honorable Albert W. Johnson, Judge of Said Court and Cause presiding:

Now comes the above-named respondent, by his attorney, Walter L. Rice, Special Assistant to the Attorney General, and by Herman F. Reich, Assistant United States Attorney, and prays that a reargument and rehearing of this cause be granted, and that said Court revoke its order of June 25, 1935, requiring respondent to release petitioner from custody in the United States Northeastern Penitentiary, and withdraw or change its opinion filed in this cause June 25, 1935, for the following reasons:

1. Said opinion and order were based partially upon the erroneous conclusion that the court and parties in the contempt trial entitled United States v. Joseph Weiner, et al. (C95–434, Southern District of New York) followed the procedure of Sections 21 and 22 of the Clayton Act and not the procedure of Section 268 of the
294 Judicial Code. This erroneous conclusion appears to have been brought about by a statement made on page 3 of petitioner's memorandum filed May 27, 1935, and in paragraph seventh of the petition, to the effect that petitioner had waived a jury trial,

implying that he had waived a jury trial because of the requirement of a jury trial contained in Section 22 of the Clayton Act, which is not true.

No exhibits or other evidence before this Court indicate that any of the defendants in said contempt proceeding waived jury trial because of any suggestion or understanding that the proceeding was governed by the Clayton Act.

The record of said contempt trial shows affirmatively that the parties and the Court understood that the proceeding was governed by Section 268 of the Judicial Code, and that a jury trial was waived because of the suggestion by counsel for the defendants that the trial procedure was governed by Section 11 of the Anti-Injunction Act (Norris Act, 29 U. S. C. A. 111, enacted March 23, 1932), granting a right to trial by jury in contempt cases involving labor disputes. Said Section 11 provides that:

"In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of
295 justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court."

The record of said contempt trial further shows that it was never suggested by defendant's counsel or anyone else, either during the trial or at the time of imposing sentence that the proceeding was governed by Sections 21 and 22 of the Clayton Act. The briefs filed in said proceeding also show that the parties and the court were following the procedure of Section 268 of the Judicial Code, and not the Clayton Act. Furthermore, the nature of the sentence imposed indicates that the court was following Section 268 of the Judicial Code, which authorizes only a sentence of fine or imprisonment. Had sentence been imposed under Section 22 of the Clayton Act, the court could have imposed a fine and imprisonment.

Respondent now desires to offer in evidence a certified transcript of the record in said criminal contempt proceeding and a certified copy of extracts from said transcript, for the purpose of showing that the court and the parties followed the procedure of Section 268 of the Judicial Code rather than the Clayton Act, and that jury trial was waived because of the suggestion that the Anti-Injunction Act applied rather than because of any understanding that the Clayton Act applied. A copy of said extracts of the transcript of record of said contempt trial is attached hereto and marked Exhibit A, and is hereby made a part hereof.

2. At the argument in this cause, May 27, 1935, counsel for respondent announced that he had in court a certified copy of

296 the record in said contempt proceeding, and would have offered in evidence said record, or appropriate extracts therefrom, in the event that the petitioner's counsel had clearly made the contention that the contempt trial followed the procedure of the Clayton Act. In the absence of any such contention this voluminous record of three volumes, comprising more than 2,100 pages, appeared to be irrelevant. Respondent, therefore, desires an opportunity to present appropriate extracts of the transcript of said proceedings to this Court, in order to show that there is no basis for the suggestion that the contempt trial followed the procedure of the Clayton Act, and to show affirmatively that counsel for both parties and the Court assumed and stated without question that the proceeding was governed by Section 268 of the Judicial Code.

3. In its opinion of June 25, 1935, this Court erroneously concluded that the exceptions to Section 22 of the Clayton Act, as provided in Section 24 of said Act, apply only to contempts committed in disobedience of an order in a civil suit not involving wrongs or injuries of a criminal nature. This conclusion appears to be based upon the confused presentation of the facts and law contained in petitioner's memorandum filed May 27, 1935, and a misunderstanding as to the precise nature of the original proceeding resulting in the decree violated by petitioner Weiner. Said original proceeding was a civil proceeding for injunction, and although having a title similar to a previous criminal prosecution involving a somewhat different group of defendants, it was entirely independent and separate from said previous criminal prosecution.

297 Section 24 of the Clayton Act clearly provides that the provisions of Section 22, limiting imprisonment to six months, shall not be construed to relate "to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." Petitioner Weiner was convicted of contempts committed in disobedience of a decree obtained by the United States in the suit entitled United States v. Greater New York Live Poultry Chamber of Commerce et al. Said suit was necessarily a civil suit, inasmuch as it sought a decree of injunction. If Section 24 related only to contempts committed in disobedience of decrees obtained in civil cases, the present case would fall squarely within such a limited construction of Section 24. The form of proceeding, and not the character of the acts involved, determines whether or not the original proceeding is civil or criminal.

There is no basis for the suggestion contained in petitioner's memorandum that Section 24 does not apply to contempts committed in disobedience of a decree obtained in a civil suit involving wrongs or injuries of a criminal nature. Nor is there any basis for the suggestion that Section 24 does not apply to criminal contempt proceedings. All contempt cases prosecuted by the United States are necessarily criminal, since they seek punitive relief. A contempt for disobedi-

ence of a decree or order obtained by the United States must necessarily involve a criminal proceeding. The provision of Section 24 would have no application or meaning whatever if it were construed as not applying to criminal contempt prosecutions for violation of decrees obtained by the United States.

298 The result of the present holding of this Court is that petitioner Weiner's sentence is shortened to six months because the original acts forming the basis of the civil injunction suit were criminal in nature.

Even if the order violated by petitioner Weiner had been entered in a criminal action, Section 24 would apply, as has been squarely held in Swepston v. United States, 251 Fed. 205, 210 (C. C. A. 6, 1918). In that case appellant had been convicted of criminal contempt for having conspired to effectuate the escape from jail of a prisoner named Dye, who had been committed to jail by an order of commitment in a criminal case entitled United States v. Dye. The Circuit Court of Appeals rejected the contention that Section 22 of the Clayton Act providing for jury trial applied. It held that Section 24 applied, because it "expressly excepts from its operations proceedings of the kind here involved", the order violated having been entered in a suit brought by the United States. It was immaterial that the order had been entered in a criminal suit. A fortiori it is immaterial that the decree violated was entered in a civil suit involving wrongs or injuries of a criminal nature.

Section 24 of the Clayton Act has been construed by the courts in only four previous cases, including Swepston v. United States, supra. Although each of those cases is squarely in conflict with the conclusion reached by this Court, none of the cases are mentioned in the Court's opinion of June 25, 1935.

299 In Forrest v. United States, 277 Fed. 873 (C. C. A. 9, 1922), the Circuit Court of Appeals held that the right to jury trial under Section 22 of the Clayton Act did not apply to cases where the decree violated had been "issued in a suit by the United States in its behalf", because of the express language to that effect in Section 24. That case is squarely in point, for the decree of injunction, as in the present case, had been obtained upon the suit of the United States, and it restrained defendants from intimidating, assaulting, or threatening a certain class of persons. In each case the original injunction suit was a civil suit where the acts sought to be enjoined were wrongs of a criminal nature.

In Canoe Creek Coal Company v. Christinson, 281 Fed. 559 (D. C. Ky. 1922; reversed on other grounds in 293 Fed. 379, 266 U. S. 42), Judge Evans carefully analyzed Sections 21, 22, and 24 of the Clayton Act, and came to the conclusion that those sections were not intended to repeal the general provisions for contempt contained in Section 268 of the Judicial Code. The court stated that under Section 24, the requirement of jury trial in Section 22 does not apply to contempts in disobedience of a decree "entered in any suit or action

brought or prosecuted in the name of the United States." The original suit there was a civil suit involving an unlawful conspiracy and wrongs of a criminal nature on the part of members of a labor union.

In Michaelson v. United States, 266 U. S. 42 (1924), the Supreme Court suggested that the requirements of Section 22 might be unconstitutional were it not for the limitations contained in Sections 21 and 24.

300 In Creekmore v. United States, 237 Fed. 743 (C. C. A. 8, 1918; cert. denied 242 U. S. 646), a sentence of one year and a day for contempt of court imposed after the enactment of the Clayton Act was held to be "within the discretion of the court", within the meaning of Section 268 of the Judicial Code.

4. It does not appear from any of the exhibits or other evidence before this Court that petitioner Weiner objected to the imposition of a sentence in excess of six months or that the trial court's attention was directed in any way to the Clayton Act. On the contrary, it affirmatively appears (1) that petitioner's counsel did not object or take an exception at the time when the trial judge imposed sentence of two years on paragraphs 5 and 6 and six months additional on paragraph 4 of the Information (Ex. 10, page 19); and (2) that petitioner Weiner and his counsel consented to a subsequent modification of sentence, whereby petitioner was sentenced to one year and a day (instead of six months) on paragraph 4 of the Information, to be served concurrently with the two-year sentence (Ex. 12, page 109). It is manifest that if objection had been made and the trial judge had taken the view that the six months' limitation of the Clayton Act applied, he would not have modified the sentences so as to make them run concurrently. The result of the present ruling by this Court is that petitioner Weiner is permitted to withdraw his consent to the imposition of sentence in excess of six months and at the same time obtain the benefit of the modification of the original sentence, which would have required him to serve two consecutive terms of imprisonment. Clearly the sentence would not have been modified unless he had consented to a sentence of a year and

301 a day on paragraph 4 of the Information. Petitioner's acquiescence and failure to make proper objection would have been fatal to a direct appeal in the contempt proceeding, and it should be equally fatal when the point is raised for the first time by habeas corpus proceedings.

5. Because of the confusion and illogical presentation of facts and legal argument in petitioner's brief of May 27, 1935, it is respectfully submitted that this Court has not had ample opportunity to obtain a clear understanding of the facts as to the nature of the original proceeding resulting in the injunction decree and of the contempt proceeding in which petitioner Weiner was convicted.

6. Counsel for respondent did not receive a copy of petitioner's memorandum until after the commencement of the argument on May

27, 1935, and therefore did not have an opportunity during the argument to read or answer the said statements contained in said memorandum.

WALTER L. RICE,
Special Assistant to the Attorney General.
HERMAN F. REICH,
Assistant United States Attorney.

July 10th, 1935.

DISTRICT OF COLUMBIA, *ss:*

Walter L. Rice, being duly sworn deposes and says:

302 1. I am a Special Assistant to the Attorney General and have been actively in charge of this proceeding on behalf of the United States and respondent herein.

2. I have prepared and read the foregoing petition and know the contents thereof and am informed and believe that the statements therein are true, the source of my information and the grounds of my belief being the documents on file in this cause and in the criminal contempt proceeding entitled United States v. Joseph Weiner et al. (C 95–434, Southern District of New York).

3. This petition is not interposed for delay, but in the sincere belief that the Court was misled by the confused and illogical statements and argument contained in petitioner's brief filed at the argument, May 27, 1935.

WALTER L. RICE.

Subscribed and sworn to before me this 10th day of July 1935.

[SEAL] DOROTHY JOST,
Notary Public.

303 *Exhibit A to petition for reargument*

Extracts from Transcript of Testimony in the Trial of United States v. Joseph Weiner et al., C95–434, in the United States District Court for the Southern District of New York, February 19–March 29, 1934

Pages 35–36 of the Transcript

I think clearly a contempt procedure is in the nature of an inquiry by the court as to whether or not its dignity has been tampered with and as to whether or not there was a violation of the direction of the court. It is in the nature, as the courts repeatedly indicate, not necessarily of a criminal trial, because there is no violation of any statute except in so far as the statute creates a penalty for a contempt of court.

The COURT. What is the section of the statute to which you refer?

Mr. KAUFMAN. Section 268 of the Judicial Code.

Now, under those circumstances I think it might be better, if the court finds this man is too ill to appear, that we proceed with his trial, in his absence, or else sever as to the defendant Schomer.

Mr. RICE. I should like to clear up one misunderstanding. Mr. Kaufman indicated that the Judicial Code provides for a penalty for contempt of court. Now, I believe what is provided for pre-
304 cisely is this, that all of the courts of the United States shall have the power to punish by fine or imprisonment contempt of their authority. Substantially that language is included in the Judiciary Act of 1789, and I believe that is the section that is now in the Judicial Code, 268, is it?

The COURT. That is the section of the Judicial Code; that is not the section of Title 28, United States Code.

Mr. KAUFMAN. I don't think so; I think it is the Judicial Code—it is the Judicial Code.

Mr. RICE. Inasmuch as the Judiciary Act provides for punishment by fine or imprisonment, I think there is some doubt as to whether a contempt is a misdemeanor or a felony.

Pages 97–98 of the Transcript

Now, there is another phase of it that is to be taken into account. Counsel for the other defendants have informed the Court that as they interpret an Act of Congress which was passed somewhat recently and since the injunction order, wasn't it?

Mr. RICE. Yes; it was in April 1932.

The COURT. That they considered that under that statute the right of a jury trial is conferred upon them upon charges such as are embodied in the present information, but that they desire to waive the right to be tried by jury on those charges in this case.

Now, that is a valuable right, if it is conferred by the Act of
305 Congress. The Government disputes the legal proposition that the right to a jury trial is conferred by that statute. Nevertheless, that is a question I should not determine until counsel have been fully heard, and I would not want, in the absence of having heard counsel upon the question and reaching a conclusion in my own mind, which I have not done, I would not want the defendants to waive the right to a jury trial, if they have it, unless it was done fully and fairly and understandingly on their part. At a proper stage in this case that question will be put to the individual defendants in person.

Page 112 of the Transcript

Mr. RICE. If your Honor please, I am prepared to present an argument to the Court regarding the effect of the Injunction Act of March 23rd, 1932, if your Honor is prepared to hear it.

The COURT. Why should I pay any attention to it if there is going to be a waiver of trial by jury? If there is going to be a waiver, that does not make any difference. We will recess until two o'clock.

Pages 116–117 of the Transcript

The COURT. Counsel have indicated a desire to waive a discussion of the question as to whether there is in this case a right of trial by

jury, and to waive the right of trial by jury. I will now hear counsel on the subject of the procedure, rather, with respect to the waiver, taking first the individual defendants.

306 Mr. KAUFMAN. On behalf of the individual defendants, irrespective of their right to a jury trial, they are anxious to proceed to trial without a jury so that the questions of fact raised by the information can be speedily and accurately determined. Each one of the defendants will state for himself that he waives a jury trial.

Pages 122–123 of the Transcript

Mr. KAUFMAN. Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, waive a trial by jury. The president of the union is in court. I have fully advised him of his rights, the rights of the union, and if your Honor desires to interrogate him, he is here for that purpose.

The COURT. Let the president of that union rise. What is his name?

Mr. KAUFMAN. David Diamondstone.

(Mr. Diamondstone rises.)

The COURT. Mr. Diamondstone, you have heard the statement of Mr. Kaufman on behalf of the union of which you are president?

Mr. DIAMONDSTONE. Yes, your Honor.

The COURT. You understand that it is the view of the counsel for the union that in a proceeding like this there is a right of trial by jury?

307 Mr. DIAMONDSTONE. I do, sir.

The COURT. Have you fully advised with Mr. Kaufman as to whether there should be a waiver by the union of which you are president, of a jury trial?

Mr. DIAMONDSTONE. I have.

The COURT. And you fully understand the situation?

Mr. DIAMONDSTONE. I do, your Honor.

The COURT. Do you waive, on behalf of the union of which you are president, the right of trial by jury in this proceeding, if there be such a right?

Mr. DIAMONDSTONE. I do, your Honor.

In United States District Court

Order refusing petition for reargument

And now, July 13, 1935, upon due consideration of the petition for reargument in the above case, it is

Ordered, that the petition for reargument be and the same hereby is dismissed and the reargument refused.

ALBERT W. JOHNSON,
U. S. District Judge.

308 In United States District Court

Petition for appeal

To the Honorable Albert W. Johnson, Judge of Said Court and Cause presiding:

Now comes the above named respondent, Henry C. Hill, Warden of the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, by his attorney, Walter L. Rice, Special Assistant to the Attorney General, under the direction of the Attorney General of the United States, and feeling himself aggrieved by the final judgment of this Court entered on the 25th day of June, 1935, wherein petitioner Joseph Weiner's writ of habeas corpus was sustained, and respondent was ordered to release said petitioner from further detention in the United States Northeastern Penitentiary, hereby prays that an appeal may be allowed to said respondent from said final judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignment of errors which is filed herewith, and that citation issue as provided by law, and that a transcript of the record, proceedings, and evidence upon which said decree is based, duly authenticated, may be sent to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, and that the time for the presentation and filing of a praecipe may be fixed and determined.

Respondent further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of
309 the United States, and he therefore prays that said appeal may be allowed without bond.

HENRY C. HILL,
Warden of the United States Northeastern Penitentiary.

By WALTER L. RICE,
Special Assistant to the Attorney General.

Dated July 27, 1935.

In United States District Court

Assignment of errors

Now comes the above named respondent, Henry C. Hill, Warden of the United States Northeastern Penitentiary, by his attorney, Walter L. Rice, Special Assistant to the Attorney General, under the direction of the Attorney General of the United States, and says that the final judgment entered herein on the 25th day of June, 1935, is erroneous; and for error the said respondent assigns the following:

1. The Court erred in holding that imprisonment of six months was the maximum term to which the petitioner, Joseph Weiner, could

have been sentenced for criminal contempt of court, and that the United States District Court for the Southern District of New York had no power to impose sentences of two years for the offenses charged in paragraphs 5 and 6 of the Information in the contempt pro-
310 ceeding entitled United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York), and a year and a day for the offense charged in paragraph 4 of said Information.

2. The Court erred in holding that Section 24 of the Clayton Act (28 U. S. C. A. 389) does not apply to the contempt proceedings for violation of the decree obtained by the United States in the equity suit entitled United States of America v. The Greater New York Live Poultry Chamber of Commerce et al. (Equity No. 52–30, Southern District of New York), which decree petitioner Joseph Weiner was convicted of violating.

3. The Court erred in holding that Section 24 of said Clayton Act, providing that nothing in Sections 21 and 22 of said Act (28 U. S. C. A. 386, 387) should be construed to relate to contempts "committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or in behalf of, the United States", does not apply to contempts committed in violation of an order or injunction entered in a suit or action involving wrongs or injuries of a criminal nature.

4. The Court erred in holding that the procedure prescribed by the Clayton Act was followed in the criminal contempt trial entitled United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

5. Under the undisputed facts, as set forth in the petition for writ of habeas corpus and in the response thereto, the Court erred in sustaining the writ of habeas corpus and in ordering respond-
311 ent to release petitioner from further detention in the United States Northeastern Penitentiary.

6. The Court erred in refusing to grant a reargument and in refusing to give respondent an opportunity upon reargument to offer in evidence a transcript of the contempt proceedings in which petitioner was convicted, which transcript shows conclusively that the parties and the court in said contempt proceeding were following the procedure of Section 268 of the Judicial Code and not the procedure of the Clayton Act.

Wherefore, respondent prays that the said final judgment be reversed and that the District Court be directed to dismiss said writ of habeas corpus.

Respectfully submitted.

WALTER L. RICE,
Special Assistant to the Attorney General.

JULY 27, 1935.

100027—36——11

312 In United States District Court

Order allowing appeal and fixing the time for filing the praecipe

This matter having come on to be heard upon the petition of the respondent, Henry C. Hill, Warden of the United States Northeastern Penitentiary, by his attorney, Walter L. Rice, Special Assistant to the Attorney General, under the direction of the Attorney General of the United States, upon appeal from the final judgment of this Court entered on the 25th day of June 1935, to the Circuit Court of Appeals for the Third Circuit, and the foregoing petition having been considered.

It is hereby ordered, that the appeal be allowed as prayed; and that the appeal being prosecuted by direction of the Attorney General of the United States, the same is allowed without bond being given by appellant; and it is hereby

Further ordered, that respondent present and file a praecipe indicating the portions of the record to be incorporated into the transcript on appeal on or before the 25th day of August 1935.

ALBERT L. WATSON,
United States Distict Judge.

Dated, Aug. 5, 1935.

313 [Citation in usual form showing service on Morgan Kaufman, filed Aug. 26, 1935, omitted in printing.]

314 In United States District Court

Praecipe for transcript of record

The Clerk of the United States District Court for the Middle District of Pennsylvania will please prepare the Record in the above named and numbered cause and certify the same to the Circuit Court of Appeals for the Third Circuit, including in said Record only the following:

1. Petition for writ of habeas corpus, filed May 7, 1935.
2. Writ of habeas corpus, filed May 7, 1935.
3. Response, filed May 27, 1935.
4. Opinion, filed June 25, 1935.
5. Order, entered June 25, 1935.
6. Information charging criminal contempt and petition for

315 rule to show cause in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York.)

7. Motion for rule to show cause in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).
8. Rule to show cause in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).
9. Memorandum of proceedings in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

10. Ex. A. Extracts from transcript of testimony in the trial of United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

11. Ex. 10. Opinion of trial judge in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

12. Ex. 1. Warrant of commitment of March 29, 1934, in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

13. Ex. 2. Amended Warrant of Commitment of June 5, 1934, in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

14. Ex. 3. Order of April 14, 1934, continuing term of court as to Joseph Weiner, in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

15. Ex. 4. Petition of Samuel M. Kaufman for an extension of the term of court as to Joseph Weiner in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

316 16. Ex. 5. Notice of and affidavit in support of motion for modification of sentence of Joseph Weiner in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

17. Transcript of hearing re modification of sentence in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

18. Ex. 6. Petition for Appeal of Joseph Weiner in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

19. Ex. 7. Order allowing Appeal and Assignment of Errors of Joseph Weiner in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

20. Ex. 8. Order and Stipulation discontinuing Appeal of Joseph Weiner in United States v. Joseph Weiner et al. (C. 95–434, Southern District of New York).

21. Ex. 11. Opinion of trial judge in suit to enjoin Joseph Weiner and others, entitled United States v. Greater New York Live Poultry Chamber of Commerce et al. (E. 52–30, Southern District of New York).

22. Final decree in United States v. Greater New York Live Poultry Chamber of Commerce et al. (E. 52–30, Southern District of New York).

23. Petition for Appeal.

24. Assignment of Errors.

25. Order allowing appeal.

26. Citation on Appeal.

317 27. Statement disclosing basis of jurisdiction of Circuit Court of Appeals.

28. Notice to appellee and acknowledgment of service of copies of Petition for and Order allowing appeal.

29. Assignment of Errors and Statement as to jurisdiction.

30. Petition for reargument.

31. Order of July 13, 1935, dismissing the petition for reargument.

32. This praecipe.

33. Certificate of the Clerk of the District Court that the foregoing documents (1 to 32, inclusive) constitute a true copy of the material parts of the Record.

WALTER L. RICE,
Special Assistant to the Attorney General,
HERMAN F. REICH,
Assistant United States Attorney,
Middle District of Pennsylvania,
Attorneys for Appellant.

Now, to wit, August 23rd, A. D. 1935, executed the within writ on Morgan Kaufman, Attorney, by making service on Pauline Griffin by reading to and making known the contents thereof and by leaving with the said Pauline Griffin a certified copy of the within writ.

Service was made at the office of Morgan Kaufman, Mears
318 Building, Scranton, Lackawanna County, and within the Middle District of Pennsylvania.

So Answers: Robert W. Rabb, United States Marshal.
Per MICHAEL J. RUDDY, *Deputy.*

Filed Aug. 26, 1935, S. W. Hofford, Clerk.

[Clerk's certificate to foregoing transcript omitted in printing.]

319 In United States Circuit Court of Appeals for the Third Circuit

No. 5895. October term, 1935

HENRY C. HILL, WARDEN, U. S. NORTHEASTERN PENITENTIARY, APPELLANT

vs.

UNITED STATES, EX REL. JOSEPH WEINER, APPELLEE

Order assigning judge

Filed November 8, 1935

Appeal from the District Court of the United States for the Middle District of Pennsylvania

And now, to-wit: this 8th day of November, A. D. 1935, it is ordered that Hon. Albert L. Watson, District Judge for the Middle District of Pennsylvania, and Hon. ———, District Judge for the ——— District of ———, be, and he is hereby assigned to sit in above case in order to make a full court.

J. WARREN DAVIS,
Circuit Judge.

(File endorsement omitted.)

320 In United States Circuit Court of Appeals for the Third Circuit

(Title omitted.)

Minute entry of hearing

And afterwards, to wit, the 8th day of November 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and Honorable Albert L. Watson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 8th day of January 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

321 In United States Circuit Court of Appeals for the Third Circuit

No. 5895. October term, 1935

HENRY C. HILL, WARDEN OF THE UNITED STATES NORTHEASTERN PENITENTIARY, APPELLANT

v.

UNITED STATES, EX REL. JOSEPH WEINER, APPELLEE

Appeal from the District Court of the United States for the Middle District of Pennsylvania

Opinion

Filed January 8, 1936

Before DAVIS and THOMPSON, Circuit Judges, and WATSON, District Judge

DAVIS, *Circuit Judge:* This is an appeal from an order of the District Court discharging Joseph Weiner from the United States Northeastern Penitentiary on the ground that the United States District Court for the Southern District of New York had no power to sentence him upon conviction for criminal contempt for a longer period than six months. He was sentenced upon his conviction by the New York court to serve two years in the penitentiary for
322 having violated a decree entered in an equity proceeding brought by the United States under the Sherman Anti-Trust Act (15 U. S. C. A. 1, 2, 3).

The decree which Weiner was charged with violating, filed February 4, 1932, enjoined him and others:

"8. (b) from attempting to create, or creating in the poultry industry of the Metropolitan Area or in the minds of any persons

engaged therein, a feeling of fear and terror for the purpose of preventing said persons from buying, selling, or distributing live poultry in a free, open, and competitive market;

"(c) from detaining, destroying, or damaging vehicles or other equipment used in conveying live poultry within, into, or through the State of New York, to or from marketmen, retail dealers, butchers, or receivers;

"(d) from refusing, or instigating refusals, to load, unload, convey, deliver, slaughter, or handle poultry for any receiver, marketman, retail dealer, or butcher, wherever the rendition of such service under reasonable conditions shall be requested and the one requesting the service shall pay, or offer and be ready, able, and willing to pay, or cause to be paid, therefor the fair and reasonable value thereof;

* * * * * * *

"(g) from causing or coercing any marketman to employ laborers in excess of his reasonable requirements, whether such coercion is effected under the guise of labor union regulations or otherwise;

"(h) from following or spying upon marketmen, retail dealers, or butchers, or their representatives, employees, or truck drivers for the purpose of ascertaining the source of their poultry supplies or intimidating them;

* * * * * * *

"(k) from restraining the freedom of any marketman, receiver, retail dealer, or butcher in any way in purchasing, loading, unloading, trucking, conveying, delivering, slaughtering, selling, or competing in the purchase and/or sale of poultry;

323

"(l) from using any of the offices or positions in Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, or in the Official Orthodox Poultry Slaughterers of America, Inc., or in similar organizations, for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular sellers thereof."

The information charging Weiner with criminal contempt was filed on July 31, 1933. On the return of the rule to show cause, he was adjudged guilty of contempt of coercing marketmen to buy feed from the Metropolitan Poultry Feed Corporation, of causing marketmen to employ laborers in excess of their reasonable requirements, and of spying upon marketmen for the purpose of compelling them to buy Metropolitan's feed in violation of the decree of the court. For these offenses he was sentenced to serve six months in the Detention Headquarters.

He was also adjudged guilty of contempt for visiting a poultry market on December 21, 1932, and threatening the proprietor and ordering him to rent poultry coops from the New Jersey Coop Company, for compelling marketmen to buy merchandise from particular sellers and to employ an excessive number of laborers in violation of the decree.

He was sentenced to serve two years in the penitentiary for these offenses. The sentences were to run consecutively.

Upon application, the court modified the six-months sentence by increasing it to a year and a day to be served in the penitentiary concurrently with the two-year sentence, so that Weiner was
324 to serve two years in the penitentiary, instead of two years in the penitentiary and six months in the Detention Headquarters.

He was committed to the Northeastern Penitentiary June 5, 1934. On May 7, 1935, he filed a petition for a writ of habeas corpus on the ground that the court had no power to sentence him for a period longer than six months, and that having served that period he was entitled to be discharged.

The determination of the question depends upon the act under which Weiner was sentenced. The appellant contends that he was sentenced under section 268 of the Judicial Code, which provides that:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

Manifestly if he was sentenced under this section, the sentence was proper and legal.

Weiner, on the contrary, contends that he was sentenced under sections 21 and 22 of the Clayton Act, which read as follows:

Section 21:

"Any person who shall willfully disobey any lawful writ, process, order, rule, decree or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if
325 the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided (28 U. S. C. A. 386)."

Section 22.

"In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury.

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may where more than one is so

damaged be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months (28 U. S. C. A. 387)."

If he was sentenced under section 22 of the Clayton Act, the sentence was illegal, for six months is the limit to which he may be sentenced under this section.

In order to interpret section 22 it is necessary to consider sections 21 and 24 of the Clayton Act.

Under section 21, if the act or thing done which violates the decree is of such character as also to constitute a criminal offense, it may be proceeded against as provided in section 22 of the Act; that is, by the court without a jury or by a jury if the accused demands it.

Did the acts or things done by Weiner constitute a criminal offense?

In the criminal information filed against him and others, it
326 was charged that they "were engaged in a combination and conspiring to restrain and monopolize; that they were attempting to monopolize, and that they had monopolized interstate trade and commerce in live and freshly slaughtered poultry in violation of the Act of Congress of July 2, 1890, entitled 'An Act To regulate trade and commerce against unlawful restraints and monopolies', commonly known as the Sherman Anti-Trust Act by the means and methods set forth in said amended petition."

These were the things which Weiner and others were convicted for doing. The injunction in substance enjoined them from doing the same things again. In violating the injunction, they at the same time committed new and independent offenses in addition to violating the decree in the trial for which they might have demanded a jury.

Section 24 provides that:

"Nothing contained in sections 386 to 388 and 390 of this title (Sections 21 to 23 and 25 of the Clayton Act) shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same and all other cases of contempt not specifically embraced within section 386 of this title may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914 (28 U. S. C. A. 389)."

In other words this section contemplates that the contempts which may be proceeded against under section 268 of the Judicial Code in which a jury could not be had by the accused on October 15, 1914, when the Clayton Act was passed, must still be prosecuted under that section. The Clayton Act intended to leave the
327 jurisdiction and procedure prevailing under 268 of the Judicial Code undisturbed, but the Clayton Act enlarged the jurisdic-

tion of the court and conferred upon it sitting in equity authority to enjoin contemplated criminal offenses, Arbuckle v. Blackburn, 113 Fed. 616, 623 (C. C. A. 6), and provided a new procedure in contempt cases for the violation of its decrees. This new procedure is applicable when it concerns acts constituting contempt which are also criminal offenses under the laws of the United States or the State where committed. Bowles v. United States, 50 Fed. (2d) 848, 851 (C. C. A. 4) (certiorari denied 284 U. S. 648).

The proceeding here came squarely within the provisions of the Clayton Act. It arose out of proceedings in equity which resulted in a final decree enjoining the defendant from the commission of criminal offenses under the Sherman Anti-Trust Act. The acts violating the decree also constituted independent criminal offenses. Weiner could have demanded a jury trial, and this was recognized by the learned trial judge of the New York Court who took the precaution to require him expressly to waive a jury.

It has been urged from matters extraneous the record that a jury was waived because of a suggestion that the procedure was controlled by section 11 of the Norris Anti-Injunction Act of March 23, 1932 (29 U. S. C. A. 111), but whatever the purpose prompting the waiver might have been, the Norris Act had no application because the case did not relate to any controversy between employers and employees or to labor disputes with which the act deals.

It has been further urged that this contempt proceeding could not have been under sections 21 and 22 for the reason that it was prosecuted in the name of the United States and section 24 provides that

nothing contained in sections 21 to 23 shall be construed to relate
328 to contempts committed in disobedience of any lawful decree entered in any suit brought or prosecuted in the name of the United States. But section 24 excepts from the purview of that section cases embraced within section 21. The cases embraced within that section may be prosecuted in the name of the United States and the case against Weiner was specifically embraced within that section. This being true the period of imprisonment for the contempt could not exceed the term of six months and the learned judge fell into error when he imposed a sentence of imprisonment of two years. When Weiner had served imprisonment for a term of six months for the contempt, he was entitled to his discharge for the contempt which he had committed.

The order appealed from is affirmed.

Dissenting opinion

THOMPSON, *Circuit Judge*, dissenting:

The appellee was one of ninety-nine co-defendants enjoined from committing various acts in furtherance of a conspiracy to restrain trade in the live poultry industry. The decree had been entered against the appellee and others on February 6, 1932, in an equity suit brought by the United States (United States against Greater New

York Live Poultry Chamber of Commerce et al., sustained in Local 167 v. United States, 291 U. S. 293). On July 31, 1933, an information charging criminal contempt for violation of the injunction decree was filed against the appellee and others. The appellee was convicted and originally sentenced to serve six months in Detention Headquarters and two years in the penitentiary consecutively. With his express consent, the six month sentence was increased to a year and a day in the penitentiary to be served concurrently with the two year sentence. On May 7, 1935, the appellee, in a petition for writ of habeas corpus, alleged that he had been sentenced for two
329 years, that the court had no power to sentence him for longer than six months, and that, having served six months, he was entitled to be discharged. This is an appeal from the order granting his petition and directing that he be discharged from the United States Northeastern Penitentiary.

The District Court discharged the appellee on the ground that section 22 of the Clayton Act (28 U. S. C. A. 387) limited his sentence to six months. This section provides:

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months."

Section 24 of the Clayton Act (28 U. S. C. A. 389) provides, however:

"Nothing contained in sections 386 to 388 and 390 of this title shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, but the same, and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914."

330 In the instant case the contempt was committed in disobedience of a lawful decree entered in a suit brought and prosecuted in the name of the United States. Sentence was therefore not limited by the provisions of sections 21 and 22 of the Clayton Act, but could be imposed within the discretion of the court whose decree had been disobeyed. I think the District Court of New York had authority to impose a sentence of more than six months and that the appellee was discharged by the District Court for the Middle District of Pennsylvania on an erroneous theory. I think therefore

the order of the District Judge should be reversed, and accordingly dissent from the majority decision.

A true copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

331 In United States Circuit Court of Appeals, for the Third Circuit

No. 5895. October term, 1935

HENRY C. HILL, WARDEN OF THE UNITED STATES NORTHEASTERN PENITENTIARY, APPELLANT

vs.

UNITED STATES, EX REL. JOSEPH WEINER, APPELLEE

Judgment

Filed January 8, 1936

Appeal from the District Court of the United States, for the Middle District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed.

Philadelphia, January 8, 1936.

J. WARREN DAVIS,
Circut Judge.

(File endorsement omitted.)

332 In United States Circuit Court of Appeals for the Third Circuit

(Title omitted.)

Petition for rehearing and reargument

Filed Feb. 6, 1936

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the above-entitled appellant by its counsel and prays that a reargument and rehearing of this appeal be granted for the following reasons:

1. The Majority Opinion of this Court is Contrary to the Supreme Court Decision in United States v. Goldman, 277 U. S. 229, and Other Cases.

333 Although the case of United States v. Goldman, 277 U. S. 229 (1928), was not referred to in the Government's brief, it was called to the attention of the Court during argument. This is the only Supreme Court opinion directly in point, and it definitely interprets the plain language of Section 24 of the Clayton Act as meaning that nothing contained in Sections 21, 22, 23, and 25 thereof shall apply to contempts for disobedience of decrees obtained in suits brought by the United States.

In the Goldman case, as in the present case, the United States filed an information charging defendants "with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States * * * to enforce the Sherman Antitrust Act" (p. 233). The criminal contempt proceeding in that case charged violation of the decree which had been obtained by the United States in a suit against the National Cash Register Company and others. The District Court dismissed the information on the ground that, under Section 25 of the Clayton Act, the prosecution was barred by the statute of limitations of one year. The Supreme Court reversed the judgment on the ground that under Section 24 of the Clayton Act nothing contained in Sections 21, 22, 23, or 25 applied to criminal contempt proceedings for disobedience of a decree entered in a suit brought by the United States.

334 Treating Sections 21 to 25 of the Clayton Act as a unit, the Supreme Court stated that "the provisions of the Clayton Act relating to punishment of criminal contempt are in Sections 21 to 25, inclusive." It held that these Sections must be construed together. The Court said (pp. 238–239):

"Although Sec. 25 is broad enough, upon its face, to provide a period of limitation of one year in all criminal contempts, we think that when construed in the light of the context and read in connection with the preceding sections, it does not relate to the prosecution for criminal contempts of the character here involved. The Act, as stated in Michaelson v. United States, supra, 66, is "of narrow scope"; and "*carefully limited to the cases of contempt specifically defined.*"

Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a federal statute or state law. And Sec. 24 specifically declares that "nothing herein contained"—*meaning evidently no provision in the Act relating to prosecutions for criminal contempts*—shall be construed to relate to contempts committed in disobedience of any order, *decree*, etc., *entered in any suit brought in the name or on behalf of the United States;* but that these and all other cases of contempt not specifically embraced within Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.

335 "It is plain, we think, that this specific exception in Sec. 24, applies to Sec. 25 relating to the period of limitations *as well*

as to the other sections, and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case, *which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States.*" [Italics ours.]

It will be noted from the above that the Supreme Court says that because of the specific language of Section 24, "no provision in the Act relating to prosecutions for criminal contempts" shall apply to contempts committed in disobedience of any decree "entered in any suit brought in the name or on behalf of the United States." It is clear that the Court had no doubt whatever that Section 24 limited the application of Sections 21 and 22 (providing for jury trial and limiting sentence to 6 months); the only doubt arose in connection with Section 25 (providing a one year statute of limitations), because it followed rather than preceded the provisions of Section 24. This is emphasized by the language quoted above wherein the Court says that the limitations contained in Section 24 apply to Section 25 "as well as the other sections" (i. e., Sections 21, 22, and 23).

Section 24 of the Clayton Act provides:

"*Nothing contained in* Sections 386 to 388 and 390 of this title [*Sections 21 to 23* and 25 of the Clayton Act] *shall be con-*
336 *strued to relate* to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor *to contempts committed in disobedience of any lawful* writ, process, order, rule, *decree*, or command *entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States*, but the same, and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914 (28 U. S. C. A. 389)." [Italics supplied.]

This is a clear declaration that nothing contained in Sections 21 and 22 (limiting sentence to 6 months) shall be construed to relate to contempts committed in disobedience of any lawful decree obtained by the United States. This language is inconsistent with the following conclusion contained in the final paragraph of the majority opinion of this Court, reading as follows:

"But § 24 excepts from the purview of that section cases embraced within section 21."

Precisely the opposite is true. Section 24 expressly provides that nothing contained in Sections 21 and 22 shall apply to contempts of decrees obtained by the United States. In other words, Section 24 expressly limits the application of Sections 21 and 22, providing that
337 they shall not apply to contempts of decrees obtained by the Government, such as the decree obtained against Weiner and others. Because of the provisions of Section 24, the 6 months' limitation on contempt sentences applies only to contempts of decrees obtained by private parties (as distinguished from decrees obtained by the Government), such as decrees obtained by an employer against

a labor union. It is clear that the whole purpose of Sections 21 to 25 of the Clayton Act was to restrict criminal contempt prosecutions for violation of decrees obtained in private litigation. For this reason Section 24 provided that nothing contained in Sections 21, 22, 23, and 25 should apply to contempts of decrees obtained in suits brought by the Government.

The Supreme Court's interpretation of Section 24 expressed in United States v. Goldman, 277 U. S. 229, has never been questioned. The same interpretation is contained in the cases cited in the Government's brief. Forrest v. United States, 277 Fed. 873, 876 (C. C. A. 9, 1922); Swepston v. United States, 251 Fed. 205, 210 (C. C. A. 6, 1918); Canoe Creek Coal Company v. Christinson, 281 Fed. 559, 564–565 (D. C. Ky., 1922, reversed on other grounds in 293 Fed. 379, 266 U. S. 42), which comprise all of the cases in point. In Michaelson v. United States, 266 U. S. 42, 66 (1924), the Supreme Court suggested that the requirements of Section 22 might be unconstitutional were it not for the limitations contained in Sections 21 and 24.

It is not unlikely that this Court failed to consider the
338 Supreme Court's opinion in United States v. Goldman because of the Government's failure to cite the case in its brief. As it is believed that this case is squarely in point and entirely inconsistent with the majority opinion of this Court, a reargument is desired primarily for the purpose of considering the Goldman case.

2. Jury trial was not waived because of the Clayton Act but because of the Norris Act.

The majority opinion implies that a jury trial was waived in the contempt proceeding because of an understanding that the proceeding was governed by the Clayton Act. On page 7 the majority opinion states that the Government's argument is based upon "matters extraneous the record." It is submitted, however, that Exhibit A (R. 303–307) is a proper part of the record, inasmuch as the Government assigned as error (R. 311) the refusal of the District Court to give the Government an opportunity upon reargument to offer Exhibit A in evidence for the purpose of showing conclusively that the parties and the court in the contempt proceeding were following the procedure of Section 268 of the Judicial Code and not the procedure of the Clayton Act. Weiner's counsel at the contempt trial expressly stated that Section 268 of the Judicial Code applied (R. 303).

Whether Exhibit A is properly a part of the record or not, Weiner, who had the burden of proof in his petition for habeas corpus, utterly failed to show that a jury trial was waived because of any
339 thought or suggestion that the contempt proceeding was governed by the Clayton Act. The waiver of jury trial would have significance only if it were waived for the purpose of meeting the jury requirement of Section 22 of the Clayton Act. Petitioner Weiner had the burden of showing that this was the purpose of the waiver. By suggesting that the waiver was because of an under-

standing that the proceeding was governed by the Clayton Act, he asks the court to imagine facts outside the record. Exhibit A was offered in the petition for reargument for the express purpose of showing conclusively that these imagined facts did not exist and that the waiver of jury trial had nothing whatever to do with the Clayton Act. Jury trial was waived not because the Norris Injunction Act would apply to the contempt proceeding but because of a possibility that it might be construed as applying since the contempt proceeding involved to a certain extent labor disputes.

3. It is Not Shown That the Contempts Were Indepe'dent Criminal Offenses.

The petition for writ of habeas corpus (R. 5–13) does not allege, nor does the record show, that the coercion and spying, comprising Weiner's contempts, constituted also Federal or State criminal offenses. Section 21 of the Clayton Act requires that the act constituting contempt be "also a criminal offense"; that is, that the act must be criminal independently of the fact that it is a criminal
340 contempt. The question here presented is not whether the contempt proceeding is criminal, but whether the act constituting contempt was an independent criminal offense. If it was not, that is an additional reason why the six months' sentence in Section 22 does not govern. On page 6 of the majority opinion it is said:

"The injunction in substance enjoined them from doing the *same* things again. In violating the injunction, they at the same time committed *new and independent offenses* in addition to violating the decree." [Italics supplied.]

It is not true, however, that the decree merely enjoined new violations of the Sherman Act. It specifically enjoined the defendants from committing the overt acts listed on pages 2 and 3 of the majority opinion. For example, the most important provision of the decree (paragraph L) enjoined them from using the offices of the labor unions for the purpose of coercing marketmen to buy supplies from particular sellers. The violation of this provision did not constitute a violation of the Sherman Act or a "new and independent offense." The scope of the decree was the particular subject of the appeal in Local 167 v. United States, 291 U. S. 293 (1934), where appellants complainted that the decree enjoined local overt acts which by themselves were not violations of the Sherman Act or any other law. The Supreme Court affirmed the decree, recognizing the power of
341 a court of equity, in order to afford "effective relief", to enjoin specific acts which were not by themselves criminal and did not constitute restraints upon interstate commerce.

The decree did more than enjoin the commission of criminal offenses under the Sherman Act (as stated on page 7 of the majority opinion); it enjoined specific acts, whether or not criminal offenses, which were likely to have the effect of renewing the violations of the Sherman Act.

4. The Majority Opinion Failed to Consider the Fact That Appellee Had Consented to the Imposition of a Sentence In Excess of Six Months.

The record discloses that Weiner's counsel consented to a modification of sentence, whereby his sentence under paragraph 4 of the Information was increased from 6 months in Detention Headquarters to a year and a day in the penitentiary, in order that it might be served concurrently with the 2 year penitentiary sentence. Without Weiner's consent the original consecutive sentences, under paragraphs 4, 5, and 6 of the Information would have stood, so that he would have been sentenced to serve two years in the penitentiary under paragraphs 5 and 6, and in addition 6 months in Detention Headquarters for the separate contempts charged in paragraph 4.

The result of the majority decision is that Weiner is permitted to profit by having consented to the imposition of a sentence in excess of 6 months, and at the same time obtain the benefit of a modi-
342 fication of the originalta consecutive sentences. As the record discloses that he expressly consented to the imposition of a sentence in excess of 6 months, it is submitted that he should not now be permitted to attack the sentence on ground that it is in excess of 6 months.

Conclusion

For all of the above reasons, but primarily because it is believed that the majority opinion is inconsistent with the Supreme Court's opinion in United States v. Goldman, 277 U. S. 229, which is the only Supreme Court case directly in point, it is respectfully submitted that the Court should grant a rehearing and reargument of this appeal, and that upon final hearing the judgment of the District Court should be reversed.

Respectfully submitted.

WALTER L. RICE,
Special Assistant to the Attorney General.
JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
Special Assistant to the Attorney General.
HERMAN F. REICH,
Assistant United States Attorney.
JOHN A. SKILES,
Special Attorney.

343 Certificate

I, Walter L. Rice, of counsel for the appellant above-named, herewith certify that the foregoing petition for rehearing and reargument is presented in good faith and not for delay.

WALTER L. RICE,
Special Assistant to the Attorney General.

344 In United States Circuit Court of Appeals for the Third Circuit

(Title omitted.)

Order granting petition for rehearing

Filed March 9, 1936

And now, to wit, March 9th, 1936, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia.

J. WARREN DAVIS,
Circuit Judge.

(File endorsement omitted.)

345 In United States Circuit Court of Appeals for the Third Circuit

(Title omitted.)

Certificate of presiding trial judge

Filed April 9, 1936

It is hereby certified that at the trial before me, in the United States District Court for the Southern District of New York, of the contempt proceeding entitled "United States v. Joseph Weiner et al." (Criminal Case No. 95-434), the Court and all counsel throughout the trial followed the procedure of Section 268 of the Judicial Code.

It is hereby further certified that at no time during said trial was it suggested by the Court or by any counsel that the procedure outlined in Sections 21 and 22 of the Clayton Act applied. At the outset of the trial it was specifically stated by counsel for Joseph Weiner, as well as by counsel for the Government, that the procedure was governed by Section 268 of the Judicial Code. Because, and solely because, of a suggestion by defendants' counsel that Section 11 of the Norris Anti-Injunction Act of March 23, 1932 (29 U. S. C. A. 111) might confer on the defendants the right to a jury trial in such proceedings (on the theory that some of the contempts involved or grew out of labor disputes) and of the desire of the defendants, stated to the court through their counsel, to waive the right to a jury trial, so claimed to have been conferred by that statute, and to be tried by the Court without a jury, it was agreed by counsel and the Court that the defendants should in open court expressly waive any right to trial by jury that they might have under that Act. The defendants, including Joseph Weiner, expressly waived jury trial, not because of any suggestion that the Clayton Act governed the procedure, but because of the suggestion that the Anti-Injunction Act might govern.

Dated April 7, 1936.

FRANCIS G. COFFEY,
United States District Judge for the Southern District of New York.

(File endorsement omitted.)

346 In United States Circuit Court of Appeals for the Third Circuit

(Title omitted.)

Minute entry of reargument

And afterwards, to wit, the 9th day of April 1936, come the parties aforesaid, by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and Honorable Albert L. Watson, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 8th day of June 1936, come the parties aforesaid, by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

347 In United States Circuit Court of Appeals for the Third Circuit

No. 5895. March term, 1936

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, APPELLANT

v.

UNITED STATES EX REL. JOSEPH WEINER, APPELLEE

Appeal from the District Court of the United States for the Middle District of Pennsylvania

Opinion on rehearing

Filed June 8, 1936

Before DAVIS and THOMPSON, Circuit Judges, and WATSON, District Judge

DAVIS, Circuit Judge: This case is here on rehearing, and the single question before us is whether or not the second prosecution of the appellant was under section 268 of the Judicial Code (28 U. S. C. A. 385) or under section 22 of the Clayton Act (28 U. S. C. A. 387). We held that it was under section 22 of the Clayton Act. We think that our conclusion was correct and briefly restate our reasons therefor.

348 When the Clayton Act was passed on October 15, 1914, the courts of the United States had power under section 268 of

the Judicial Code to punish by fine or imprisonment contempts of their authority, but such power under this section, under which the warden says the appellee was tried, did not "extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The Clayton Act conferred upon the courts a new jurisdiction in contempt cases. Section 21 (28 U. S. C. A. 386) of the Act provides that "any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any state in which the act was committed shall be proceeded against for his said contempt as hereinafter provided", particularly in section 22.

This section provides that the trial of the accused for contempt within the purview of section 21 "may be by the court, or, upon demand of the accused, by a jury; * * * and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information." If the accused be found guilty, he may be punished by fine or imprisonment, or both, in the discretion of the court, but the imprisonment shall not "exceed the term of six months."

349 If in violating the decree of the court, a person also in and by the same act commits a criminal offense as defined in section 21, he must be prosecuted for his contempt under section 22 and allowed a jury trial. While the Act provides that the trial "may be * * * by a jury", this provision is not merely permissive, but is really mandatory. Michaelson v. United States, 266 U. S. 42, 45.

Section 24 of the Act (28 U. S. C. A. 389) defines the specific kind of contempt which must be tried under section 22. It provides that nothing contained in sections 21, 22, 23, and 25 of the Act "shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt *not specifically embraced within section 386 of this title* (*Section 21 of the Clayton Act*), (italics ours) may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914"; when the Clayton Act was passed.

In passing section 21 of that Act Congress did not intend to repeal section 268 of the Judicial Code, or to cover the same ground which that section covers. It was careful to keep away from the jurisdiction covered by that section. It merely intended to give the courts additional power in contempt cases. Before the Clayton Act was passed, federal courts sitting in equity did not have the power to punish for contempt a violation of their decree when the violation also constituted an independent criminal offense.

Contempt is specifically embraced within section 21 of the
350 Clayton Act, so that it must be prosecuted under section 22 of the Act and not under section 268 of the Judicial Code, when an order or decree of the court is violated and the violation at the same time constitutes an independent criminal offense. When these two things take place in one and the same act, then the contemner must be prosecuted under section 22 of the Act, whether or not the decree was entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United States, or by private parties. The antecedents of the word "same" in section 24 in the sentence beginning with the words, "but the *same*, and all other cases of contempt", etc., are not only the contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, but also contempts committed in disobedience of any lawful writ, process, order or decree entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, and all other cases of contempt not embraced in section 21. In other words these antecedent types of contempts, whether by private parties or the government, must be prosecuted under the law as it was when the Clayton Act was passed, but those contempts, which are specifically embraced within section 21 of the Clayton Act must be prosecuted under section 22 of the Act in which the contemner may demand a jury trial. That is, all kinds of contempt, with one exception, must be tried as they were on October 15, 1914, and that is by the court without a jury. That one exception is created and defined by sections 21, 22, and 24 of the Clayton Act and there is a good reason for the exception: A person may not be tried and convicted for the commission of a crime, even though the crime involves the violation of the decree of a court, without the right of trial by jury. This right the constitution gives him.

The case at bar is specifically embraced within section 21 of
351 the Act because the contemner violated the decree of the court and committed an independent criminal offense in one and the same act or deed. The thing which he did and for which he was tried, convicted, and punished in the first trial is the same thing for which he was tried, convicted, and punished in the second trial. The criminal offense which he committed in the first trial was the violation of the anti-trust laws. He was enjoined from committing the offense again. In doing the same thing again, he admittedly violated

the decree of the court, and at the same time committed an independent criminal offense, for if the thing done the second time was not criminal, neither was it the first time. No one contends that Weiner did not commit a criminal offense the first time. Consequently the offense was criminal when committed the second time. His contempt was therefore specifically embraced within section 21 of the Act and he could not be tried under section 268 of the Judicial Code, but had to be tried under section 22 of the Clayton Act. He waived a jury trial, as he could do, and was proceeded against under this section of the Act by the court without a jury. Upon conviction he could not be imprisoned for a term exceeding six months and having served that term, he was entitled to his liberty.

The judgment of the District Court is affirmed.

A true copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

352 In United States Circuit Court of Appeals for the Third Circuit

No. 5895. March term, 1936

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, APPELLANT

vs.

UNITED STATES EX REL. JOSEPH WEINER, APPELLEE

Judgment

Filed June 8, 1936

On appeal from the District Court of the United States for the Middle District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, June 8, 1936.

J. WARREN DAVIS,
Circuit Judge.

(File endorsement omitted.)

353 [Clerk's certificate to foregoing transcript omitted in printing.]

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

File No. 40711. U. S. Circuit Court of Appeals, Third Circuit. Term No. 171. Henry C. Hill, Warden, United States Northeastern Penitentiary, petitioner, vs. United States ex rel. Joseph Weiner. Petition for a writ of certiorari and exhibit thereto. Filed July 8, 1936. Term No. 171, O. T., 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	6

CITATIONS

Cases:

Canoe Creek Coal Co. v. *Christinson*, 281 Fed. 559, reversed, 293 Fed. 379, 266 U. S. 42 — 12

Creekmore v. *United States*, 237 Fed. 743, certiorari denied, 242 U. S. 646 — 12

Forrest v. *United States*, 277 Fed. 873 — 12

Hill v. *United States ex rel. Joseph Weiner*, 11 F. Supp. 195 — 2

Local 167 et al. v. *United States*, 291 U. S. 293 — 2, 4, 9, 13

Michaelson v. *United States*, 266 U. S. 42 — 12

Swepston v. *United States*, 251 Fed. 205 — 12

United States v. *Goldman*, 277 U. S. 229 — 6, 10, 15

United States, v. *Greater New York Live Poultry Chamber of Commerce et al*, 291 U. S. 293 — 9

United States v. *Taliaferro*, 290 Fed. 214 affirmed, 290 Fed. 906 — 9

Statutes:

Clayton Act, Section 21, 28 U. S. C. A. 386 — 2, 7

Clayton Act, Section 22, 28 U. S. C. A. 387 — 2, 7

Clayton Act, Section 24, 28 U. S. C. A. 389 — 2, 8

Norris-La Guardia Anti-Injunction Act, Section 11, 29 U. S. C. A. 111 — 14

Sherman Antitrust Act, 15 U. S. C. A. 1, 2, 4 — 4

Section 268 of the Judicial Code, 28 U. S. C. A. 385 — 9

Miscellaneous:

Congressional Record, 48, pt. 9, pp. 8778, 8779, 8780, 8785 — 9

Congressional Record, 48, pt. 12, App. p. 314 — 9

79577—36——1

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. ——

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

v.

UNITED STATES EX REL. JOSEPH WEINER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of petitioner, Henry C. Hill, Warden of the United States Northeastern Penitentiary, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on June 8, 1936, affirming the order of the District Court for the Middle District of Pennsylvania, which directed petitioner to release the relator, Joseph Weiner, from the United States Northeastern Penitentiary.

OPINIONS BELOW

The opinion of the District Court (R. 286–292) on the petition for writ of habeas corpus, filed June 25, 1935, is reported in 11 F. Supp. 195. The majority and dissenting opinions in the Circuit Court of Appeals, filed January 8, 1936, and the opinion on rehearing, filed June 8, 1936, are not yet reported.

The decree violated by Weiner was affirmed by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293 (1934).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question presented is whether the six months' limitation on sentences for certain classes of criminal contempt, as provided in Sections 21 and 22 of the Clayton Act (28 U. S. C. A. 386, 387), applies to contempts for disobedience of decrees entered in suits brought by the United States; or whether such contempts are excepted from Sections 21 and 22 by Section 24 of the Clayton Act (28 U. S. C. A. 389), which provides that nothing contained in Sections 21 and 22 "shall be construed to relate to * * * contempts committed in disobedience of any lawful * * *

decree * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

Additional questions presented are:

(a) Whether the contempts of which Weiner was convicted were shown to be independent criminal offenses within the meaning of Section 21 of the Clayton Act;

(b) Whether the contempt trial followed the procedure of the Clayton Act rather than the ordinary procedure for criminal contempt;

(c) Whether Section 24 of the Clayton Act is repugnant to the Fifth Amendment of the Constitution, in that it classifies contempt proceedings growing out of Government decrees separately from those growing out of private decrees;

(d) Whether Weiner consented to the imposition of a sentence in excess of six months.

STATUTES INVOLVED

The pertinent provisions of the Clayton Act (Secs. 21–25) and Section 268 of the Judicial Code are set forth below in "Reasons for Granting the Writ."

STATEMENT

Relator, Joseph Weiner, was one of five defendants convicted on March 29, 1934, after a trial before the United States District Court for the Southern District of New York, of criminal contempt for having violated a decree of that court (Ex. 10, R. 111–125).

The decree had been entered February 6, 1932, in an equity suit brought by the United States under the Sherman Antitrust Act (15 U. S. C. A. 1, 2, 4) (R. 13–22). It enjoined 99 defendants, including Weiner, from committing various acts in furtherance of a conspiracy to restrain trade in the live poultry industry. It specifically enjoined them from using the offices of two labor unions to coerce marketmen to buy poultry feed and other commodities from particular sellers (R. 19–21). The decree was affirmed by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293 (1934).

An information charging criminal contempt, filed July 31, 1933, charged Weiner and others with various acts of coercion and intimidation in violation of the decree. Weiner was convicted of the charges contained in paragraph 4 of the information, alleging that he and others had used the offices of Local 167 and the Shochtim Union to coerce marketmen to buy feed from the Metropolitan Poultry Feed Corporation, and of the charges contained in paragraphs 5 and 6, alleging that he had coerced marketmen to rent poultry coops from the New Jersey Coop Company and had used his office as a delegate of the Shochtim Union for this purpose (R. 40–43).

Upon conviction Weiner was originally sentenced to serve six months in Detention Headquarters for the contempts charged in paragraph 4 of the information, and in addition two years in the

penitentiary for the contempts charged in paragraphs 5 and 6 (R. 129). Thereafter, he applied to the court for a modification of his sentence, and with his express consent, the six months sentence, which was to have been served consecutively after service of the two year sentence, was increased to a year and a day in the penitentiary, to be served concurrently with the two year sentence (R. 279).

Weiner appealed to the Circuit Court of Appeals for the Second Circuit, but withdrew his appeal on June 29, 1934 (Exs. 6, 7, 8, R. 90–98).

Thereafter Weiner was committed to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania (R. 24–25), situated in the Middle District of Pennsylvania.

On May 7, 1935, Weiner filed a petition for a writ of *habeas corpus* in the District Court for the Middle District of Pennsylvania, alleging that he had been sentenced to the penitentiary for two years, that the court had no power to sentence him for longer than six months, and that having served six months he was entitled to be discharged (R. 5–12).

The District Court for the Middle District of Pennsylvania granted Weiner's petition and ordered that he be discharged from the United States Northeastern Penitentiary (R. 292–3). The Circuit Court of Appeals for the Third Circuit affirmed, January 8, 1936, one judge dissenting. The warden filed a petition for rehearing,

pointing out that the court had failed to consider the only Supreme Court case in point, *United States* v. *Goldman,* 277 U. S. 229. The court granted a rehearing, and on June 8, 1936, filed an opinion on rehearing, again affirming the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the six months' limitation on contempt sentences, provided for in Sections 21 and 22 of the Clayton Act, applies to contempts for disobedience of a decree entered in a suit brought by the United States, and that such contempts are not excepted from the provisions of Sections 21 and 22 by Section 24 of the Clayton Act;

2. In holding that the contempts of which Weiner was convicted were independent criminal offenses within the meaning of Section 21 of the Clayton Act;

3. In holding that the contempt trial followed the procedure of the Clayton Act rather than the ordinary procedure for criminal contempt;

4. In failing to take into consideration Weiner's express consent to the imposition of a sentence in excess of six months.

REASONS FOR GRANTING THE WRIT

1. The court below erroneously held that the six months' limit on contempt sentences contained in Sections 21 and 22 of the Clayton Act applied to

Weiner's sentence for violation of a Government decree, and failed to give effect to the express provision of Section 24 of the Clayton Act that nothing contained in Sections 21 and 22 shall be construed to relate to contempts committed in disobedience of any lawful decree entered in any suit or action brought by the United States.

Section 21 of the Clayton Act provides:

> Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. (28 U. S. C. A. 386.)

Section 22 of that Act prescribes the procedure in punishing contempts within the Act, providing in part:

> In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury.
>
> * * * * *
>
> If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States

> or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. (28 U. S. C. A. 387.)

The scope of these two sections is expressly limited by Section 24 of the Clayton Act, which provides:

> Nothing contained in sections 386 to 388 and 390 of this title [Sections 21 to 23 and 25 of the Clayton Act] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (28 U. S. C. A. 389.)

The language of Section 24 is free from ambiguity. It provides that the requirement for jury trial and the six months limitation in Sections 21 and 22 shall not apply to contempts committed in

disobedience of *any* lawful decree entered in any suit or action *brought by the United States.*

The decree violated by Weiner was entered in a suit brought by the United States, namely, the suit entitled *Local 167 et al.* v. *United States,* 291 U. S. 293.[1]

Section 24 specifically provides that contempts of such decrees (i. e., Government decrees) shall be prosecuted in conformity to prior usages—in other words, in accordance with Section 268 of the Judicial Code (28 U. S. C. A. 385), which provides that the federal courts shall have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

Section 24 limits the application of Sections 21 and 22 to contempts of *private* decrees, such as those obtained by employers against employees. The legislative history of the Clayton Act shows that Congress deliberately differentiated between contempts of private decrees and contempts of Government decrees, in order that "the Government's ancient rights as a litigant be not impaired." *United States* v. *Taliaferro,* 290 Fed. 214 (W. D. Va., 1922), affirmed, 290 Fed. 906 (C. C. A. 4th, 1923); (48 Cong. Rec., pt. 9, p. 8778, 62nd Cong., 2nd Sess.; pt. 12 App., p. 314; pt. 9, pp. 8779, 8780, 8785.)

[1] In the District Court for the Southern District of New York this suit was entitled *United States* v. *Greater New York Live Poultry Chamber of Commerce et al.*

The present case is parallel to that of *United States* v. *Goldman*, 277 U. S. 229 (1928), where this Court interpreted the plain language of Section 24 as meaning that nothing contained in Sections 21, 22, 23 and 25 shall apply to contempts of decrees obtained by the United States. In that case, as in the present, the United States filed an information charging defendants "with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States * * * to enforce the Sherman Antitrust Act" (p. 233). The criminal contempt proceeding there charged violation of the decree which had been obtained by the United States in a suit against the National Cash Register Company and others. The District Court dismissed the information on the ground that, under Section 25 of the Clayton Act, the prosecution was barred by the statute of limitations of one year. This Court reversed, saying (pp. 238–239):

> Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a federal statute or state law. And Sec. 24 specifically declares that "*nothing herein contained*"—*meaning evidently no provision in the Act relating to prosecutions for criminal contempts*—shall be construed to relate to contempts committed in

> disobedience of any order, *decree,* etc., *entered in any suit brought in the name or on behalf of the United States*; but that these and all other cases of contempt not specifically embraced within Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.
>
> It is plain, we think, that this specific exception in Sec. 24, applies to Sec. 25 relating to the period of limitations *as well as to the other sections,* and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case, which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States. (Italics supplied.)

In pointing out that the exceptions provided by Section 24 apply to Section 25 "as well as to the other sections," it is clear that this Court had no doubt whatever that Section 24 limited the application of Sections 21 and 22 (providing for jury trial and limiting sentence to 6 months); the only doubt arose in connection with Section 25 (providing a one-year statute of limitations), because it followed rather than preceded Section 24.

The majority opinion of the court below is squarely in conflict with the opinion of this Court in the *Goldman* case. Neither the original opinion of the Circuit Court of Appeals nor its opinion on rehearing considered the *Goldman* case or any of the decisions of other Circuit Courts of Appeals

construing Section 24 of the Clayton Act, which are clearly in conflict with the decision below.[2]

In *Michaelson* v. *United States,* 266 U. S. 42, 66 (1924), this Court, in holding Sections 21–24 constitutional, called attention to the "narrow scope" of Section 22 and the limitations placed upon it by Section 24.

2. An additional ground for holding that the proceeding is not governed by Section 22 of the Clayton Act is that Section 21 requires that the contempt constitute an independent criminal offense. The Circuit Court of Appeals erroneously held that the contempts of which Weiner was con-

---

[2] In *Forrest* v. *United States*, 277 Fed. 873, 876 (C. C. A. 9th, 1922), it was held that the right to jury trial under Section 22 of the Clayton Act did not apply to cases where the decree violated had been "issued in a suit by the United States in its behalf," because of the express language to that effect in Section 24. In *Swepston* v. *United States*, 251 Fed. 205, 210 (C. C. A. 6th, 1918), the court rejected the contention that the requirement for jury trial in Section 22 of the Clayton Act applied to a contempt proceeding based upon violation of an order of commitment entered in a criminal suit brought by the United States, and held that Section 24 applied. See also *Canoe Creek Coal Company* v. *Christinson*, 281 Fed. 559, 564–565 (D. C. Ky., 1922; reversed on other grounds in 293 Fed. 379, 266 U. S. 42), where the court concluded that Sections 21, 22 and 24 were not intended to repeal the broad, general provisions for contempt contained in Section 268 of the Judicial Code. A sentence of one year and a day for contempt of court has been held to be within the "discretion of the court" within the meaning of Section 268 of the Judicial Code. *Creekmore* v. *United States*, 237 Fed. 743 (C. C. A. 8th, 1916; certiorari denied 242 U. S. 646).

victed were independent criminal offenses within the meaning of Section 21.

It appears to have reached its conclusion from the fact that the decree was originally based upon a violation of the Sherman Act, which is a criminal offense. The court erroneously assumed that the decree merely enjoined future violations of the Sherman Act and that therefore when Weiner violated the decree he necessarily committed an independent criminal offense. The decree enjoins specific overt acts, such as using the offices of two labor unions to coerce marketmen to buy feed from particular sellers. The scope of this decree was attacked in *Local 167* v. *United States*, 291 U. S. 293 (1934), where appellants (including Weiner) complained that the decree enjoined acts which were in themselves not violations of the Sherman Act. This Court affirmed the decree, recognizing the power of a court of equity, in order to afford "effective relief", to enjoin specific acts which by themselves did not constitute restraints upon interstate commerce.

3. There is no basis for the conclusion of the court below that the trial judge in the District Court for the Southern District of New York followed the procedure of the Clayton Act rather than the general procedure for criminal contempt cases. This conclusion was based upon the fact that the defendants at the contempt trial waived any right which they might have to trial by jury. The record

clearly shows that jury trial was waived, not because of any thought that Section 22 of the Clayton Act governed, but because of a suggestion made at the outset of the proceeding that the trial procedure was governed by Section 11 of the Norris-La Guardia Anti-Injunction Act (29 U. S. C. A. 111), granting a right to trial by jury in contempt cases involving labor disputes (R. 303–307). Weiner's counsel at the contempt trial expressly stated that Section 268 of the Judicial Code applied (R. 303).

4. The Circuit Court of Appeals failed to consider the contention that Weiner had expressly consented to the imposition of a sentence in excess of six months. He was originally sentenced to serve consecutively six months in the Detention Headquarters and two years in the penitentiary. Upon his application and express consent, the six months' sentence was increased to a year and a day, in order that it might be served concurrently with the two year penitentiary sentence (Ex. 12, R. 278–280). After expressly consenting to the imposition of a sentence in excess of six months, Weiner should not be permitted to attack the sentence on the very ground that it exceeds six months.

The effect of the holding of the Circuit Court of Appeals is to limit all sentences for contempt of Government decrees under the antitrust laws to six months, despite the express language of Section 24 that Sections 21 and 22 shall not apply to con-

tempts of decrees obtained by the United States. The majority opinion below is not only in conflict with the plain wording of the statute and the decisions of other Circuit Courts of Appeals on the same matter, but it also ignores the decision of this Court in the *Goldman* case squarely holding that under Section 24 of the Clayton Act nothing contained in Sections 21, 22, 23 and 25 shall apply to contempts of decrees obtained by the United States.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	7
Argument:	
I. The two-year contempt sentence was properly imposed by the court within its discretion under Section 268 of the Judicial Code. The power of the court to impose such a sentence is not restricted by Sections 21 and 22 of the Clayton Act limiting contempt sentences to six months because Section 24 of that Act expressly provides that the limitations of Sections 21 and 22 shall not apply to contempts of decrees entered in suits brought by the United States	8
II. The contempt charges against respondent were not tried under the procedure of the Clayton Act	20
III. Respondent's consent to the imposition of a sentence in excess of six months precludes him from attacking the sentence on the very ground that it exceeds six months	23
Conclusion	24

CITATIONS

Cases:	
Canoe Creek Coal Co. v. *Christinson*, 281 Fed. 559	14
Creekmore v. *United States*, 237 Fed. 743	8
Forrest v. *United States*, 277 Fed. 873	14
Local 167 et al. v. *United States*, 291 U. S. 293	1, 4
Magnard v. *United States*, 23 F. (2d) 141	19
Michaelson v. *United States*, 266 U. S. 42	11, 14
Swepston v. *United States*, 251 Fed. 205	14
United States v. *Goldman*, 277 U. S. 229	7, 12, 22
United States v. *Taliaferro*, 290 Fed. 214	15
Statutes:	
Clayton Act:	
Section 21 (U. S. C., Tit. 28, Sec. 386)	9
Section 22 (U. S. C., Tit. 28, Sec. 387)	9
Section 24 (U. S. C., Tit. 28, Sec. 389)	10

108738—36——1

Statutes—Continued.

	Page
Judicial Code:	
Section 268 (U. S. C., Tit. 28, Sec. 385)	3, 8
Norris-La Guardia Anti-Injunction Act:	
Section 11 (U. S. C., Tit. 29, Sec. 111)	20

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 171

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

v.

UNITED STATES EX REL. JOSEPH WEINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 146–149) is reported in 11 F. Supp. 195. The majority and dissenting opinions in the Circuit Court of Appeals (R. 163–169) are reported in 84 F. (2d) 27, and the opinion of the Circuit Court of Appeals on rehearing (R. 176–179) is reported in 84 F. (2d) 31.

The decree violated by respondent was upheld by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 179). The petition for a writ of certiorari was filed July 8, 1936, and was granted October 12, 1936 (R. 180). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the six months' limitation on sentences for certain classes of criminal contempt which is provided in Sections 21 and 22 of the Clayton Act (U. S. C., Tit. 28, Secs. 386, 387) applies to contempts for disobedience of decrees entered in suits brought by the United States under the Sherman Antitrust Act, or whether such contempts are excepted from Sections 21 and 22 by Section 24 of the Clayton Act (U. S. C., Tit. 28, Sec. 389), which provides that nothing contained in Sections 21 and 22 "shall be construed to relate to * * * contempts committed in disobedience of any lawful * * * decree * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

(2) Whether respondent was tried for criminal contempt pursuant to the procedure provided in the Clayton Act or whether he was tried by the ordinary procedure for such trials under the general power of the court at its discretion to punish

for contempt as provided in Section 268 of the Judicial Code (U. S. C., Tit. 28, Sec. 385).

(3) Whether respondent's consent to the imposition of a sentence in excess of six months precludes him from attacking the sentence on the very ground that it exceeds six months.

STATUTES INVOLVED

The pertinent statutory provisions are set forth and discussed in the argument.

STATEMENT

Respondent Joseph Weiner was one of five defendants tried before District Judge Caffey and convicted on March 29, 1934, of criminal contempt for having violated a decree of the United States District Court for the Southern District of New York (Ex. 10, R. 56–69). The decree had been entered February 6, 1932, in an equity suit brought by the United States charging a conspiracy under the Sherman Antitrust Act (U. S. C., Tit. 15, Secs. 1, 2, 4) (R. 7–11). The conspiracy involved price fixing and allocation of retail dealers among wholesale marketmen in the New York live poultry industry. It was effectuated by respondent and other delegates of Local 167 of the Teamsters' Union and Local 440 of the Slaughterers' Union (the two unions operating in the live poultry industry) through their power to boycott and intimidate recalcitrant marketmen (Ex. 11, R. 69–90).

The decree enjoined 99 defendants, including respondent, from committing various acts in furtherance of the conspiracy, and specifically enjoined them from committing acts of coercion and intimidation against poultry dealers (R. 10–11), and

> from using any of the offices or positions in Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, or in the Official Orthodox Poultry Slaughterers of America, Inc., or in similar organizations, for the purpose of *coercing marketmen to buy poultry, poultry feed, or other commodities* necessary to the poultry business, from any particular sellers thereof. [R. 11.] [Italics supplied.]

The decree was affirmed by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293.

An information, filed July 21, 1933, charged respondent and others with criminal contempt in having coerced and intimidated marketmen in violation of the decree (R. 17–30). Respondent was convicted of the charges contained in paragraph 4 of the information alleging that he and others had used the offices which they held in Local 167 and the Slaughterers' Union to coerce marketmen to buy feed from the Metropolitan Poultry Feed Corporation, and of the charges contained in paragraphs 5 and 6 alleging that he had coerced marketmen to rent poultry coops from the New Jersey Coop Company and had used his office as a delegate of the

Slaughterers' Union for this purpose (R. 21–22, 62–63).

Respondent and other delegates of the two labor unions had protected the monopoly of the Metropolitan Poultry Feed Corporation in the business of selling feed, and the monopoly of the New Jersey Coop Company in the business of renting coops, by using their power over the labor unions to compel marketmen to patronize these companies[1] (R. 61–64, 139–141).

Upon conviction respondent was originally sentenced to serve six months in the House of Detention for the contempts charged in paragraph 4 of the information and, in addition, two years in the penitentiary for the contempts charged in paragraphs 5 and 6 (R. 66–67). Thereafter he applied to the court for a modification of his sentence, and with his express consent the six months' sentence, which was to have been served consecutively after

---

[1] The New Jersey Coop Company charged $1.00 rental for coops which could be *purchased* from manufacturers for $1.53 each. It rented each coop as many as 200 times in the course of 16 months (R. 64, 141). Its annual coop rentals aggregated more than $1,000,000. The Metropolitan Poultry Feed Corporation, which was owned and controlled by respondent and other delegates of the two labor unions, enjoyed a virtual monopoly in the business of selling feed to poultry dealers, despite the fact that it charged them in excess of prevailing market prices (R. 62, 64, 129, 131–132, 139–141).

service of the two-year sentence, was increased to a year and a day in the penitentiary, to be served concurrently with the two-year penitentiary sentence (R. 143, 146).

Respondent appealed to the Circuit Court of Appeals for the Second Circuit, but withdrew his appeal on June 29, 1934 (Exs. 6, 7, 8, R. 46–50).[2]

Thereafter respondent was committed to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania (R. 12–13), situated in the Middle District of Pennsylvania.

On May 7, 1935, respondent filed a petition for a writ of *habeas corpus* in the District Court for the Middle District of Pennsylvania alleging that he had been sentenced to the penitentiary for two years, that the court had no power to sentence him for longer than six months, and that having served six months he was entitled to be discharged (R. 3–6).

The District Court for the Middle District of Pennsylvania granted respondent's petition and ordered that he be discharged from the penitentiary (R. 146–150). The Circuit Court of Appeals for the Third Circuit affirmed the order on January 8, 1936, one judge dissenting (R. 163–169).

---

[2] In consideration for having withdrawn his appeal he obtained a substantial reduction of a three-year indeterminate sentence which had been imposed by the Court of Special Sessions of Bronx County, New York, July 5, 1933 (Ex. 12, R. 118–120, 127).

The warden of the penitentiary filed a petition for rehearing, pointing out that the court had failed to consider the case of *United States* v. *Goldman*, 277 U. S. 229, which is directly in point and sustains the warden's position that the two-year sentence is valid (R. 169–174). The court granted a rehearing and on June 8, 1936, filed an opinion on rehearing, again affirming the order without mentioning the *Goldman* case (R. 175–179).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the six months' limitation on contempt sentences provided for in Sections 21 and 22 of the Clayton Act applies to contempts for disobedience of a decree entered in a suit brought by the United States, and that such contempts are not excepted from the provisions of Sections 21 and 22 by Section 24 of the Clayton Act;

2. In holding that the contempt trial followed the procedure of the Clayton Act rather than the ordinary procedure for criminal contempt;

3. In failing to take into consideration respondent's express consent to the imposition of a sentence in excess of six months.

108738—36——2

ARGUMENT

I

The two-year contempt sentence was properly imposed by the court within its discretion under Section 268 of the Judicial Code. The power of the court to impose such a sentence is not restricted by Sections 21 and 22 of the Clayton Act limiting contempt sentences to six months because Section 24 of that Act expressly provides that the limitations of Sections 21 and 22 shall not apply to contempts of decrees entered in suits brought by the United States

Respondent's two-year sentence was properly imposed under Section 268 of the Judicial Code (U. S. C., Tit. 28, Sec. 385), which provides that federal courts shall have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority." As pointed out by the Circuit Court of Appeals for the Eighth Circuit in upholding a contempt sentence of a year and a day in *Creekmore* v. *United States,* 237 Fed. 743, 748 (cert. den. 242 U. S. 646), the Judicial Code vests "almost unlimited discretion in the court as to the character and extent of punishment" for contempt.

The court below held that the sentence was governed by Sections 21 and 22 of the Clayton Act limiting contempt sentences within the purview of those sections to six months (R. 163–169, 176–179). In so holding it failed to give effect to the express provision of Section 24 of the Clayton Act that nothing contained in Sections 21 and 22 shall be

construed to relate to contempts committed in disobedience of any lawful decree entered in any suit or action brought by the United States.

Section 21 of the Clayton Act provides:

> Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. [U. S. C., Tit. 28, Sec. 386.]

Section 22 of the Clayton Act prescribes the procedure in punishing contempts within the Act, providing in part:

> In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury.
>
> * * * * *
>
> If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be di-

> vided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. [U. S. C., Tit. 28, Sec. 387.]

The scope of these two Sections is expressly limited by Section 24 of the Clayton Act, which provides:

> Nothing contained in sections 386 to 388 and 390 of this title [Sections 21 to 23 and 25 of the Clayton Act] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to *contempts committed in disobedience of any lawful* writ, process, order, rule, *decree,* or command *entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States,* but the same, and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. [U. S. C., Tit. 28, Sec. 389.] [Italics supplied.]

Section 24 of the Clayton Act thus provides that the requirement for jury trial and the limitation on sentences in Sections 21 and 22 shall not apply to contempts committed in disobedience of *any* lawful decree entered in any suit or action *brought by*

the United States. The decree violated by respondent was entered in a suit brought by the United States, namely, the suit entitled *United States* v. *Greater New York Live Poultry Chamber of Commerce* (R. 7–11). It necessarily follows that the contempt sentence is governed not by the Clayton Act but by the law prevailing prior to the enactment of the Clayton Act, namely, Section 268 of the Judicial Code.

The District Court held that Section 24 of the Clayton Act did not apply because "any suit or action" applies only to suits "where the act or acts to be enjoined are wrongs or injuries of a civil and not of a criminal nature" (R. 149). No reason is given or authority cited for this unusual interpretation of the statute. It is true that Sections 21–25 relate "exclusively to criminal contempts." *Michaelson* v. *United States,* 266 U. S. 42, 65. But this does not mean that *all* criminal contempts are governed by the procedure outlined in Sections 21 and 22.

The Circuit Court of Appeals held that if the contumacious act is also a criminal offense, the contempt proceeding must be governed by Sections 21 and 22 regardless of whether the decree violated is one obtained by the United States (R. 178). The majority opinion concluded that "section 24 excepts from the purview of that section cases embraced within section 21" (R. 167). *Precisely the converse is true. Section 24 limits the application*

of Sections 21 and 22. The exception in Section 24 would have no application or meaning whatever if it were construed as not applying to criminal contempt prosecutions for violation of decrees obtained by the United States.

The present case is parallel to that of *United States* v. *Goldman,* 277 U. S. 229, where this Court interpreted the plain language of Section 24 as meaning that nothing contained in Sections 21, 22, 23, and 25 shall apply to contempts of decrees obtained by the United States. In that case, as in the present, the United States filed an information charging defendants "with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States * * * to enforce the Sherman Antitrust Act" (p. 233). The criminal contempt proceeding there charged violation of a decree which had been obtained by the United States in a suit against the National Cash Register Company and others. The District Court dismissed the information on the ground that, under Section 25 of the Clayton Act, the prosecution was barred by the statute of limitations of one year. This Court reversed the order, saying (pp. 238–239):

> Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a federal statute or state law.

> And Sec. 24 specifically declares that *"nothing herein contained"—meaning evidently no provision in the Act relating to prosecutions for criminal contempts*—shall be construed to relate to contempts committed in disobedience of any order, *decree,* etc., *entered in any suit brought in the name or on behalf of the United States;* but that these and all other cases of contempt not specifically embraced within Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.
>
> It is plain, we think, that this specific exception in Sec. 24, applies to Sec. 25 relating to the period of limitations *as well as to the other sections,* and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States. [Italics supplied.]

In holding that the exceptions provided by Section 24 apply to Section 25 "as well as to the other sections," it is clear that this Court had no doubt whatever that Section 24 limited the application of Sections 21 and 22 (providing for jury trial and limiting sentence to six months). The only doubt arose in connection with Section 25 (providing a one-year statute of limitations), because it followed rather than preceded Section 24, but this Court held that Section 25, as well as Sections 21 and 22, was limited by Section 24 and did not apply to pro-

ceedings for contempt of decrees entered in any suit brought by the United States.

In *Michaelson* v. *United States,* 266 U. S. 42, 66, this Court, in holding Sections 21–24 constitutional, called attention to the "narrow scope" of Section 22 and the limitations placed upon it by Section 24. These limitations have been applied repeatedly by the lower courts.[3]

Section 24 limits the application of Sections 21 and 22 to contempts of *private* decrees, such as those obtained by employers against employes as distinguished from decrees in proceedings brought by the Government. The legislative history of the Clayton Act shows that it deals only with "contempt cases growing out of private disputes," and that Congress deliberately differentiated between contempts of private decrees and contempts of Government decrees in order that "the Govern-

---

[3] In *Forrest* v. *United States*, 277 Fed. 873, 876 (C. C. A. 9th), it was held that the right to jury trial under Section 22 of the Clayton Act did not apply to cases where the decree violated had been "issued in a suit by the United States in its behalf," because of the express language to that effect in Section 24. In *Swepston* v. *United States*, 251 Fed. 205, 210 (C. C. A. 6th), the court rejected the contention that the requirement for jury trial in Section 22 of the Clayton Act applied to a contempt proceeding based upon violation of an order of commitment entered in a criminal suit brought by the United States, and held that Section 24 applied. See also *Canoe Creek Coal Co.* v. *Christinson*, 281 Fed. 559, 564–565 (D. C. Ky.; reversed on other grounds in 293 Fed. 379; 266 U. S. 42), where the court concluded that Sections 21, 22, and 24 were not intended to repeal the broad, general provisions for contempt contained in Section 268 of the Judicial Code.

ment's ancient rights as a litigant be not impaired." *United States* v. *Taliaferro*, 290 Fed. 214, 222–223 (W. D. Va.), affirmed, 290 Fed. 906 (C. C. A. 4th).

The congressional debates and committee reports support the plain meaning of Section 24. Senator Borah, a member of the Senate Judiciary Committee, offered an amendment (which was rejected) to strike out Section 24 for the very reason that it differentiated between contempts of decrees obtained by the Government and contempts of decrees obtained by private litigants. During the debate on his proposed amendment he called attention to the fact that under Section 24, "even if the act be also a crime, yet if it is in a Government suit no trial by jury can be had." He said:

> The Government brings a suit, and the trial in contempt cases is by the court. A private party brings a suit, and the trial for contempt cases is by the jury. [51 Cong. Rec., pt. 14, p. 14371, 63d Cong., 2d Sess.]

He contended that practically all cases under the Sherman Act would be Government cases, and that therefore the bill "operates to confine itself to employer or employee, or cases of a private nature" (*Id*, pp. 14372–14373). This interpretation, which was reiterated by Senators Cummins and Chilton, also members of the Judiciary Committee, was accepted by all who participated in the debate as the correct interpretation of Section 24 (*Id.*, pp. 14371–14374, 14413–14414).

When the provisions which are now Sections 21–25 were first being considered in the House, Representative Clayton, sponsor of the bill, explained that Section 24 excepted contempts for violation of Government decrees because of the Attorney General's suggestion that the courts would otherwise be handicapped in the enforcement of Government decrees dissolving combinations in restraint of trade. He said:

> *The next objection that was made to it was that it would probably detract from the powers of the courts to enforce their decrees of dissolution of combinations denounced by the antitrust law.* I violate no confidence when I say that that was the criticism of the chief legal officer of the present administration, Attorney General Wickersham. *We have met that objection by providing in this bill that it shall not apply in any case where the United States is the party complainant.* [48 Cong. Rec., pt. 9, p. 8778, 62d Cong., 2d Sess.] [Italics supplied.]

Representative Clayton stated that the purpose of the restrictions in Sections 21–25 of the Clayton Act was to prevent private corporations from obtaining blanket injunctions against laborers and then subjecting such laborers to summary and severe criminal prosecution for violation of the injunctions. During a debate between sponsors and opponents of the bill, in which it is clear that both sides had no doubt as to the intention of excepting

criminal contempts for violation of decrees obtained by the Government, Representative Clayton emphasized repeatedly that the bill did not disturb the existing procedure to enforce Government decrees. The following colloquy shows beyond any question that this was the purpose, and that Section 24 clearly expresses the intention of Congress:

> Mr. LONGWORTH. Suppose a case like this, where there was a strike on a railroad engaged in interstate commerce, and the United States courts should enjoin interference with the free passage of trains, say, in and out of a station?
>
> Mr. CLAYTON. The bill on its face says that in any case *where the United States is the complainant it has no application.* It is to prevent one party litigant in a civil suit invoking this criminal process of the court to oppress his weaker neighbor.
>
> It does not intend to detract and does not detract one iota from the power, the majesty, and the dignity of the United States. *The Government of the United States has under this bill every power,* even when it becomes a law, *to enforce its judgments and its demands that it has now.* [48 Cong. Rec., pt. 9, p. 8779.] [Italics supplied.]

Representative Clayton further said:

> I will state, what I said in the beginning, that *this bill, wherever the Government of the United States is a party to it, does not*

> *have any application,* and I adhere to that position. *But I say that wherever it is a question between private persons, be they corporations or individuals, this bill has application.* I do not know how I can make it any plainer than that. [*Id.,* p. 8785.] [Italics supplied.]

The same thought was expressed by Representative Floyd, a member of the House Judiciary Committee, who said:

> It does not apply to any case in which the United States is a party. *So it leaves all the powers that exist in the Government at present undisturbed by its passage. The purpose of this bill is to prevent injustice in certain classes of cases which chiefly grow out of labor disputes, where great and powerful corporations,* on the one hand, go into the Federal courts and seek to enforce their decrees and judgments against laboring people. [Id., p. 8750.] [Italics supplied.]

Representative John W. Davis of West Virginia, also a member of the House Judiciary Committee, declared in an address upon the pending bill:

> That clause of the bill which exempts from its provisions suits brought and prosecuted in the name or on behalf of the United States manifestly has reference to cases instituted under the interstate-commerce or antitrust acts. These acts and their enforcement are still in a formative stage. Especially is this true of the antitrust act, the rights and remedies under which are not

> even yet clearly defined. For this reason the committee thought it wise to exclude them for the time being from the operation of the bill. [48 Cong. Rec., pt. 12, App., p. 314.]

Thus the legislative history clearly discloses the congressional intent in enacting Sections 21–25 of the Clayton Act. It shows that the provisions of Section 24 excluding contempts of decrees entered in suits brought in the name of the United States from the operation of Sections 21–25 were inserted for the specific purpose of insuring that the enforcement of Government decrees in antitrust suits would not be affected by the limitations that were being imposed on the procedure for enforcing decrees obtained by private litigants. It is submitted that the language of Sections 21–25 is so clear that there is no doubtful question presented, but that even if there were any doubts on the face of the statute, they would be wholly dispelled by the above legislative history.

It is also submitted that any doubts as to whether or not the restrictive provisions of Sections 21 and 22 of the Clayton Act applied to criminal contempts of Government decrees would be resolved against such a construction, because as stated in *Maynard* v. *United States,* 23 F. (2d) 141, 143 (Ct. of App., D. of C.):

> The Clayton Act is in the nature of a special statute, and the provision for the trial of contempt by a jury, being a limitation upon the inherent general power of the court to

punish for contempt, must be limited strictly to cases arising under the statute, and should not be extended to the matter of the punishment of contempt generally.

II

The contempt charges against respondent were not tried under the procedure of the Clayton Act

The court below erroneously concluded that the trial court in the Southern District of New York had proceeded under the Clayton Act rather than the general procedure contemplated by Section 268 of the Judicial Code. This conclusion was based solely upon an unwarranted inference from the fact that the defendants at the contempt trial had waived any right which they might have had to trial by jury (R. 167, 179).

Jury trial was waived not because of any thought that Section 22 of the Clayton Act governed the trial, but because of a suggestion that the trial procedure was governed by Section 11 of the Norris-LaGuardia Anti-Injunction Act (U. S. C., Tit. 29, Sec. 111), granting a right to trial by jury in contempt cases involving or growing out of labor disputes.

There was no evidence before the lower court indicating that the defendants in the contempt proceeding waived jury trial because of any understanding that the proceeding was governed by the Clayton Act. On the contrary, the record of the contempt trial shows affirmatively that the court

and the parties followed the procedure of Section 268 of the Judicial Code rather than the Clayton Act, and that jury trial was waived because of a suggestion that the Anti-Injunction Act might be applicable (Ex. A, R. 155–157). Respondent's counsel at that trial expressly stated that Section 268 of the Judicial Code applied (Ex. A, R. 155–156). This is further confirmed by the certificate of Judge Caffey, the presiding trial judge, who certified that the court and counsel followed the procedure of Section 268 of the Judicial Code, and that jury trial was waived merely because of a suggestion that the Anti-Injunction Act might govern, and "that at no time during said trial was it suggested by the Court or by any counsel that the procedure outlined in Sections 21 and 22 of the Clayton Act applied" (R. 175).

The majority opinion below states that the Government's argument is based upon "matters extraneous the record" (R. 167), evidently referring to Exhibit A to the petition for reargument in the District Court (R. 155–157). The District Court denied the petition for reargument (R. 157). But whether or not Exhibit A to the petition for reargument is properly a part of the record, respondent, who had the burden of proof in presenting his petition for *habeas corpus*, failed to make any affirmative showing that a jury trial had been waived because of the Clayton Act. The waiver of jury trial would have significance only if it were

for the purpose of meeting the jury requirement of Section 22 of the Clayton Act. By suggesting that the waiver was because of an understanding that the proceeding was governed by the Clayton Act, respondent asked the court to imagine facts outside the record. Exhibit A was offered in the petition for reargument in the District Court merely for the purpose of showing that these imagined facts did not exist and that the waiver of jury trial had nothing whatever to do with the Clayton Act.

Further indication that respondent did not regard the contempt proceeding as coming under the Clayton Act may be found in the fact that, although the information charged respondent with acts of contempt occurring more than one year previously,[4] respondent did not plead the one-year statute of limitations found in Section 25 of the Clayton Act. Although the Government submits that the limitation period provided in Section 25 would in no event have been applicable since the proceeding was for contempt of a decree obtained by the Government (*United States* v. *Goldman*, 277 U. S. 229), nevertheless, according to respondent's interpretation of the Clayton Act the one-year limitation period would have been applicable if respondent had regarded the case as coming under

[4] For example, paragraph 4 of the information, under which respondent was convicted, charged him with contempts "continuously since the entry of said decree," which was entered February 6, 1932 (R. 21). The information was filed July 31, 1933, more than a year later.

the Clayton Act at all. Since respondent did not plead the one-year statute of limitations provided in Section 25, it is obvious that respondent did not at the time of the contempt trial regard the trial as governed by the procedure applicable to contempt cases set forth in Sections 21–25 of the Clayton Act.

III

Respondent's consent to the imposition of a sentence in excess of six months precludes him from attacking the sentence on the very ground that it exceeds six months

There was no evidence before the District Court to show that respondent's counsel had objected to the imposition of a sentence in excess of six months or that he had called the trial court's attention to the Clayton Act or any other statute limiting the sentence.

On the contrary, it appears affirmatively: (1) that respondent's counsel did not object or take an exception when the trial judge imposed the sentence of two years in the penitentiary under paragraphs 5 and 6 and six months additional in the House of Detention under paragraph 4 of the information (Ex. 10, R. 66–67); and (2) that respondent and his counsel consented to a subsequent modification of sentence, whereby respondent was sentenced under paragraph 4 to one year and a day in the penitentiary (instead of six months in the House of Detention) to be served concurrently

with the two-year penitentiary sentence (Ex. 12, R. 142–143).[5]

The result of the judgment below is that respondent is permitted to withdraw his consent to increasing the six months' sentence to a year and a day, and at the same time obtain the benefit of the modification of the original sentences, which would have required him to serve two consecutive terms of imprisonment. After expressly consenting to the imposition of a sentence in excess of six months, respondent should not now be permitted to attack the sentence on the very ground that it exceeds six months.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment below should be reversed.

STANLEY REED,
Solicitor General.
JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
WALTER L. RICE,
Special Assistants to the Attorney General.
N. A. TOWNSEND, Jr.,
Special Attorney.

NOVEMBER 1936.

---

[5] Respondent's acquiescence and failure to make proper objection would have been fatal to a direct appeal in the contempt proceeding, and it should be equally fatal when the point is raised for the first time by *habeas corpus* proceedings.

U. S. GOVERNMENT PRINTING OFFICE: 1936

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 171

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

v.

UNITED STATES EX REL. JOSEPH WEINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

I.

SECTION 24 OF THE CLAYTON ACT, PROPERLY AND EFFECTIVELY CONSTRUED, DOES NOT VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION.

Respondent contends that if Section 24 of the Clayton Act is given the effective construction which the government has placed upon it, there would be an arbitrary discrimination in favor of the government in violation of the due process clause of the Fifth Amendment (respondent's brief, p. 7).

116964—37

The government submits that respondent's argument is wholly without merit and that the separate classification given by Section 24 to contempts of decrees obtained by the government and those obtained in private suits is neither arbitrary nor unreasonable. Congress may classify persons and objects for the purpose of legislation, and due process requires only that the classification be reasonable and that it bear some relation to the object sought to be attained by the legislation. *United States* v. *Delaware & Hudson Railway Co.*, 213 U. S. 366; *Nebbia* v. *New York*, 291 U. S. 502; *Second Employers' Liability Act Cases*, 223 U. S. 1. The legislative history of Section 24 discloses that Congress had a reasonable basis for treating contempts of decrees obtained in suits by the government differently from contempts involving decrees obtained in private suits. The purpose of the different treatment, as is manifest from statements by sponsors of the bill quoted on pages 15–19 of our original brief, was to curb the abuses by private corporations of the injunctive process without detracting from the government's power to enforce its injunctions, particularly those obtained by the government against combinations in restraint of trade. Representative Clayton, sponsor of the bill, stated that the purpose was to prevent private corporations from abusing the process of contempt by obtaining "blanket midnight injunctions" against laboring people and "framing up criminal cases for the purpose of

depriving men of the right of trial by jury" (48 Cong. Rec. Pt. 9, p. 8779, 62nd Cong., 2nd Sess.). Other members of the House and Senate Judiciary Committees made similar statements as to the purpose of the new remedy, and no member of Congress appears to have expressed a contrary purpose.

Thus it appears that Congress adopted the reasonable theory that there would be less likelihood of abusing the injunctive process if restrictions were imposed upon the enforcement of decrees obtained in private suits.

It should be noted that Sections 21–25 of the Clayton Act deal entirely with *procedural* rather than substantive rights. That the government may be granted remedies not made available to individuals generally is demonstrated by *United States* v. *Union Pacific Ry. Co.*, 98 U. S. 569, where the Court sustained a statute which authorized the government to institute special proceedings in connection with frauds committed in building the Union Pacific Railway, rejecting the contention that the statute was unconstitutional because it discriminated in favor of the government.

Respondent's brief (p. 9) suggests that the only purpose of punishment for criminal contempt is to vindicate the dignity and authority of the court and that the dignity of the court is in no greater need of vindication in the case of a contempt of a government decree than in the case of a contempt of a private decree. This Court has recognized, in

Michaelson v. *United States,* 266 U. S. 42, 65, that the "dominating purpose" of a criminal contempt proceeding "is punitive to vindicate the authority of the court *and to punish the act of disobedience as a public wrong*" (Italics supplied). The proceeding is one "between the public and the defendant," not between the court and the defendant. *Michaelson* v. *United States,* 266 U. S. 42, 67.

Section 24 does not impose a higher punishment upon one than is "prescribed to all for like offenses," as suggested in respondent's brief (p. 7), because the offense committed by violating a public decree obtained by the government is not identical with the offense committed by violating a private decree. The "public wrong" is normally more serious where the contempt is in violation of a decree obtained by the government, and Congress may therefore classify the latter contempts separately and provide more favorable procedure for defendants violating decrees obtained in private suits. Such classification is reasonably related to the object sought to be attained, namely, curbing abuses of the injunctive process by private corporations and maintaining the government's power to punish effectively public wrongdoers who violate decrees obtained by the government.

In *Michaelson* v. *United States,* 266 U. S. 42, this Court overruled a contention that Sections 21–25 interfered with the inherent power of a court to punish for contempt and held that these sections were constitutional. After emphasizing the nar-

row scope of Section 22 and the limitations placed upon it by Section 24, the Court said (p. 66): "If the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise." In *United States* v. *Goldman*, 277 U. S. 229, respondent urged that it would be unreasonable to restrict Section 25 of the Clayton Act to contempts of private decrees,[1] but this Court expressly said that under Section 24 the provisions of Sections 21, 22, 23, and 25 do not apply to criminal contempts for disobedience of decrees obtained by the United States. It assumed that these provisions of the Clayton Act were constitutional.

II

THE SIX MONTHS' LIMITATION ON CONTEMPT SENTENCES IN SECTION 22 OF THE CLAYTON ACT IS INSEPARABLE FROM THE PROVISION OF SECTION 24 TO THE EFFECT THAT SECTION 22 SHALL NOT APPLY TO CONTEMPTS OF DECREES OBTAINED BY THE GOVERNMENT. RESPONDENT CANNOT ATTACK THE VALIDITY OF SECTION 24 BECAUSE HE IS NOT INJURED BY THE CLASSIFICATION THEREIN.

In enacting Sections 21–25 of the Clayton Act, Congress created a new remedy for the protection of defendants in certain classes of contempts of decrees obtained in private suits. Senator Borah's amendment to strike out Section 24 and thereby extend the limitations of Section 22 to contempts

[1] See respondent's brief in *Goldman* case, p. 39 (Records and Briefs, October Term, 1927, No. 723).

of decrees obtained in suits by the government was rejected (51 Cong. Rec., Pt. 14, pp. 14377, 14417, 63d Cong., 2d Sess.). This is a clear indication that Congress did not intend to extend the procedure of Section 22 to contempts of decrees obtained in suits by the government.

If Section 24 were invalid, then Section 22 likewise would fall because Congress clearly intended that the six months' limitation on contempt sentences should not apply to contempts of decrees obtained by the government. Therefore, if the classification which Congress clearly intended to make should be held to be invalid, it would carry with it the six months' limitation imposed by Section 22. The legislative history leaves no doubt but that the six months' limitation on contempt sentences in Section 22 and the exemption in Section 24 from such limitation for contempts of decrees obtained by the government are inseparable.

It follows therefore that if Section 24, to the extent that it exempts contempts of decrees obtained by the government from the six months' limitation imposed by Section 22, is unconstitutional, the six months' limitation of Section 22 also is unenforceable and the remedies for contempt existing prior to the Clayton Act are applicable. Thus, even if there were an invalid classification in Section 24, respondent would not be injured by it and could not attack it. *Frothingham* v. *Mellon,* 262 U. S. 447, 488. Respondent is in no position to complain that the new procedure prescribed by the Clayton Act is unconstitutional merely because it does not

go further and extend to him the same advantages which it extends to defendants violating private injunctions.

Respondent relies upon the separability clause of the Clayton Act (U. S. C., Title 15, Sec. 27). The construction contended for by respondent requires more than the mere presumption of separability. It requires that the Court reframe the legislation in a manner explicitly and vigorously opposed by sponsors of the bill and members of the committees which reported it.

The presumption of separability is rebutted, not only by the express language of the Act but also by the legislative history which establishes "the clear probability that the legislature would not have been satisfied with the statute unless it had included" the part alleged to be invalid. *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 184.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Court applied the following test of separability (at p. 313):

> Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code.

Rejection of the Borah amendment demonstrates unequivocally the intention of Congress not to en-

act Section 22 of the Clayton Act without the qualifying limitations contained in Section 24.

In *United States* v. *Goldman*, 277 U. S. 229, 238, this Court treated Sections 21–25 as a unit:

> Although Sec. 25 is broad enough, upon its face, to provide a period of limitation of one year in all criminal contempts, we think that when construed in the light of the context *and read in connection with the preceding sections*, it does not relate to the prosecution for criminal contempts of the character here involved. [Italics supplied.]

A statute which "expressly and clearly changes the common law only in certain distinctly specified cases cannot properly be construed as applying to other cases." *United States* v. *Taliaferro*, 290 Fed. 214, 222. As this Court said in *Ross* v. *Jones*, 22 Wall. 576, 591–592:

> Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strictness, both as to the methods to be pursued and the cases to which they are to be applied.

III

THE COURT BELOW ERRONEOUSLY ASSUMED THAT THE TRIAL COURT HAD FOLLOWED THE PROCEDURE OF THE CLAYTON ACT, AND CONCLUDED THAT THE SENTENCE MUST THEREFORE BE LIMITED BY SECTION 22 OF THE CLAYTON ACT.

In our original brief (pp. 20–23) we pointed out that because of respondent's waiver of jury trial,

the court below erroneously concluded that the trial court in New York had proceeded under the Clayton Act rather than under Section 268 of the Judicial Code. Respondent now replies that the procedure followed by the trial court is of no materiality. We agree that it is not material. However, both courts below (R. 149, 167) advanced the supposed fact that the trial court had followed the procedure of the Clayton Act as one of their reasons for applying the six months' sentence provided by Section 22 of the Clayton Act. It therefore became necessary to note, as we did in our main brief, that the trial court had not followed the procedure of the Clayton Act.

CONCLUSION

In conclusion, it should be observed that respondent has suggested (p. 12) that the trial court in imposing a two-year sentence failed to give weight to the fact that respondent had been sentenced for certain related offenses by a New York State court. As we have pointed out in our original brief (footnote p. 6), respondent obtained a substantial reduction of a three-year indeterminate sentence which had been imposed by the state court in consideration for having withdrawn his appeal from the two-year sentence imposed by the United States District Court for Southern New York. Furthermore, it is well settled that a defendant whose single act violates a decree of a court as

well as a criminal statute may be tried and punished for both. *In Re Debs,* 158 U. S. 564, 594.

It is respectfully submitted that the judgment below should be reversed.

STANLEY REED,
Solicitor General.

JOHN DICKINSON,
Assistant Attorney General.

WENDELL BERGE,
WALTER L. RICE,
Special Assistants to the Attorney General.

N. A. TOWNSEND, JR.,
Special Attorney.

JANUARY 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Office - Supreme Court, U.S.
FILED
SEP 5 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 171

HENRY C. HILL, Warden, United States Northeastern Penitentiary,

Petitioner,

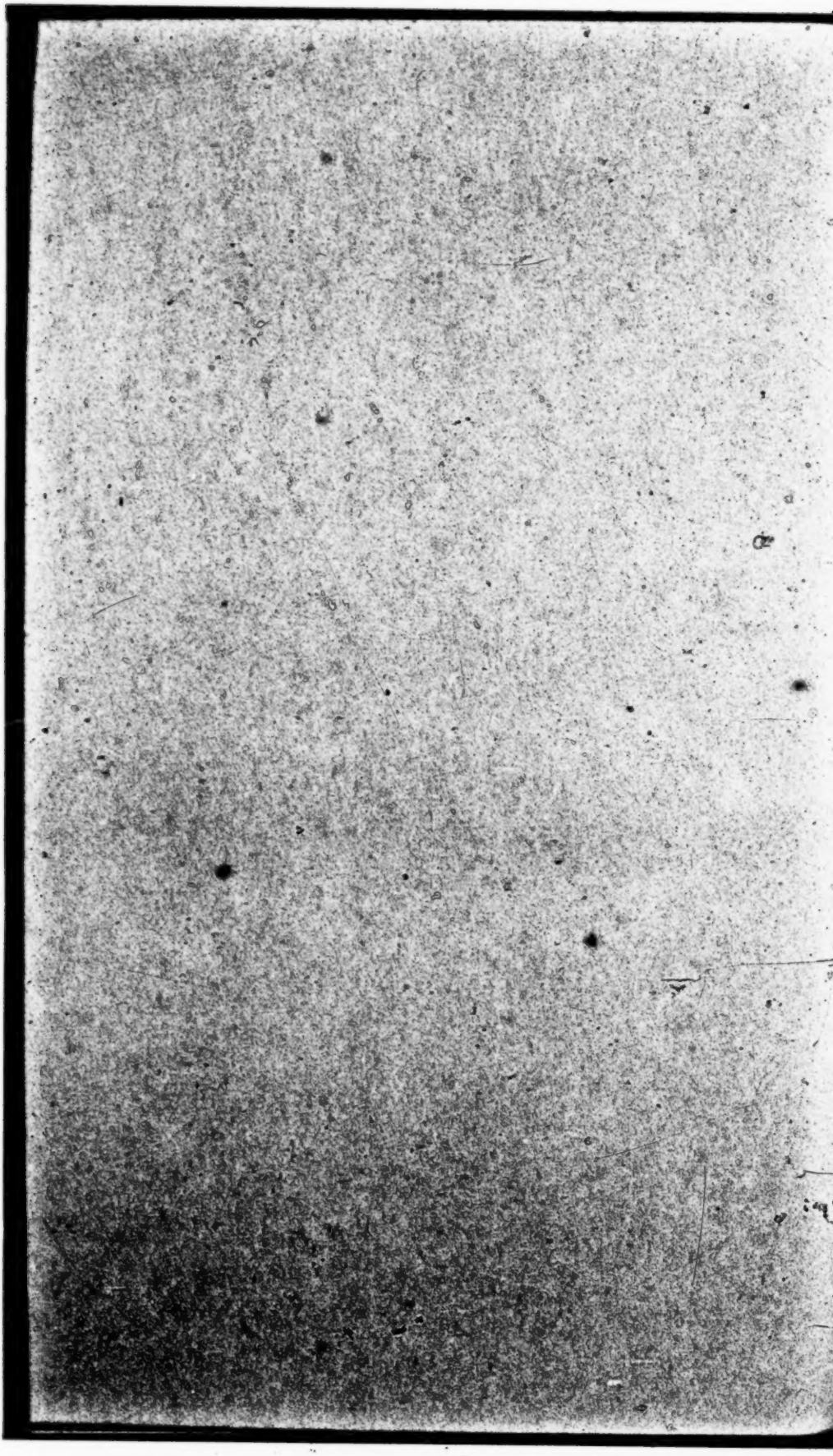
—against—

UNITED STATES *ex rel.* JOSEPH WEINER.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL H. KAUFMAN,
Attorney for Joseph Weiner, Respondent.

THE COURT PRESS, N. Y. C.



INDEX.

	PAGE
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Argument	5
Appendix	13

TABLE OF CASES CITED:

Brougham v. *Oceanic Steam Navigation Co.*, 205 F. 857, 860 (C. C. A. 2nd, 1913)	12
Canoe Creek Coal Co. v. *Christinson*, 281 F. 559 (D. C. Ky., 1922), 293 F. 279, 266 U. S. 42	11
Chapman & Dewey Lumber Co. v. *St. Francis Levee District*, 234 U. S. 667	12
Chicago, B. & Q. Ry. Co. v. *Willard*, 220 U. S. 413	12
Creekmore v. *United States*, 237 F. 743 (C. C. A. 8th, 1916, 242 U. S. 646)	12
Forrest v. *United States*, 277 F. 873 (C. C. A. 9th, 1922)	11
Gregory v. *Pike*, 67 F. 837, 852 (C. C. A. 1st, 1895)	12
Local 167 et al. v. *United States*, 291 U. S. 293	2
Mansfield v. *Swan*, 111 U. S. 379	12
Maxwell Land-Grant Case, 122 U. S. 365, 375	12

PAGE

People v. *Weiner*, 264 N. Y. 534 ..... 4, 6
Prussian v. *United States*, 282 U. S. 675, 677 11

Swepston v. *United States*, 251 F. 205 (C. C. A. 6th, 1918) 11

United States v. *Atchison T. & S. F. Ry. Co.*, 142 F. 176, 181 (Circuit Ct. W. D. Mo., 1905) 11
United States v. *Goldman*, 277 U. S. 229 11
United States v. *Taliferro*, 290 F. 214 (W. D., Va., 1922) 11
United States v. *Weitzel*, 246 U. S. 533, 543 11

STATUTES CITED:

Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a, 385):

Section 240(a) 1
Section 268 ..... 2, 9, 11, 12, 16

Clayton Act (28 U. S. C. A., Secs. 386, 387, 389):

Section 21 ..... 2, 5, 7, 8, 9, 10, 11, 13
Section 22 ..... 2, 5, 7, 8, 10, 11, 12, 13
Section 24 ..... 2, 8, 9, 10, 11, 12, 15
Section 25 11

Penal Law of the State of New York:

Section 530 ..... 4, 5, 6

Sherman Anti-Trust Act 2, 3, 6, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. ———.

HENRY C. HILL, Warden, United States Northeastern Penitentiary,

Petitioner,

—against—

UNITED STATES *ex rel.* JOSEPH WEINER.

BRIEF IN BEHALF OF JOSEPH WEINER, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The opinion of the District Court for Middle Pennsylvania, filed June 25, 1935, is reported in 11 F. Supp. 195 (R. 286-292).

The majority and dissenting opinions of the Circuit Court of Appeals for the Third Circuit, filed January 8, 1936, are unreported (R. 320-325). The opinion of the Circuit Court of Appeals upon rehearing, filed June 8, 1936, is unreported (R. 334-336).

Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a). The judgment of the Circuit Court of Appeals was entered June 8, 1936.

Question Presented:

Whether the limitation of six months on sentences for criminal contempt, as provided in Sections 21 and 22 of the Clayton Act (28 U. S. C. A., Secs. 386, 387) is applicable to contempts for violation of a decree entered in a suit brought by the United States, *where the contumacious acts also constitute criminal offenses under a Statute of the United States or under the laws of the State in which such acts were committed;* or whether such contempts are excepted from the provisions of Sections 21 and 22 of the Clayton Act, by Section 24 of said Act (28 U. S. C. A., Sec. 389).

Statutes Involved.

The statutes involved, Sections 21, 22 and 24 of the Clayton Act (28 U. S. C. A., Secs. 386, 387, 389) and Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385) are printed in an appendix hereto (pp. 13-16).

Statement.

The respondent, Joseph Weiner, was convicted of criminal contempt, for violation of a decree of the United States District Court for Southern New York, entered February 6, 1932, in a suit in equity under the Sherman Anti-Trust Act, brought by the United States against Greater New York Live Poultry Chamber of Commerce, and others, including the respondent [affirmed *sub. nom. "Local 167 et al.* v. *United States"*, 291 U. S. 293] (R. 9; Ex. 10, 111-125). The decree adjudged that 99 defendants, including the respondent, had participated in a conspiracy to

restrain and monopolize interstate commerce in live poultry, in violation of the Sherman Anti-Trust Act; and enjoined the commission of certain specified acts, including, *inter alia,* the coercion of marketmen "to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular seller thereof" (R. 5-6, 18-21).

By information filed July 31, 1933, the United States Attorney for Southern New York, accused the respondent and others of criminal contempt, alleging that the cited defendants had committed specified acts of coercion and intimidation in violation of the said decree. These acts are separately described in separately numbered paragraphs of the information (R. 33-56).

The District Court for Southern New York found the respondent guilty of criminal contempt in the commission of the acts specified in paragraphs "4", "5" and "6" of the information (R. 9).

Paragraph "4" charged the respondent with using his position in Local 440 of the Poultry Shochtim Union of Greater New York, a labor union: to coerce marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation; to coerce marketmen to employ workmen in excess of their reasonable requirements, "for the purpose among others of compelling said marketmen to buy their feed exclusively from the Metropolitan Feed Corporation"; and to spy upon marketmen for the same purpose (R. 7, 40-41).

Paragraph "5" of the information charged the respondent with visiting the S. S. & B. Market at 1314 Cooper Ave., Bronx, N. Y., and threatening to injure one of its proprietors, and the property of said market, unless the proprietors thereof bought poultry

coops exclusively from the New Jersey Coop Company; and with thereafter causing the S. S. & B. Market to be wrecked and damaged, and the proprietors, employees of the S. S. & B. Market and other persons in the poultry trade in Greater New York to be terrified and put in fear (R. 7, 41-42).

Paragraph "6" of the information charged the respondent with using his position as an official delegate of Local 440 of the Orthodox Slaughterers of America, Inc., to coerce Sam Weiner and others to buy their poultry and other commodities from particular sellers, and to employ laborers in excess of their reasonable requirements (R. 8, 42). [Paragraphs "4", "5" and "6" of the information are printed in full in an appendix hereto (pp. 16-18).]

The conviction followed a trial before the District Court, the respondent having waived a trial by jury (R. 9).

Certain of the acts specified in paragraphs "5" and "6" of the information were also the basis of a criminal prosecution against the respondent for violation of Section 530 of the Penal Law of the State of New York, which resulted in the respondent's conviction, and sentence for an indeterminate term of imprisonment (R. 227-228, 238-240). (*People* v. *Weiner,* 264 N. Y. 534.)

The respondent was originally sentenced by the United States District Court for Southern New York to serve six months in Detention Headquarters in the City of New York for the contempts charged in paragraph "4" of the information, and two years in the penitentiary for the contempts charged in paragraphs "5" and "6" (R. 9, 22-23).

On June 5, 1934, upon respondent's application, the sentence as to paragraph "4" was modified to "one

year and a day in the penitentiary, sentence on paragraph 4 to run concurrently with sentence on paragraphs 5 and 6" (R. 9, 24-25).

Upon completion of his prison term for violation of Section 530 of the Penal Law of the State of New York, respondent was committed to the United States Northeastern Penitentiary at Lewisburg, Pa. After serving six months of his sentence at Lewisburg (less time allowed for good behavior), respondent sought his release by petition for a writ of habeas corpus filed in the United States District Court for Middle Pennsylvania, alleging that the sentence of the United States District Court for Southern New York was void, and contrary to Section 22 of the Clayton Act, to the extent that it was in excess of six months (R. 5-12). His petition was granted and his discharge ordered (R. 212).

The Circuit Court of Appeals, Third Circuit, affirmed, one judge dissenting. Upon rehearing granted on the petition of the Warden, the Circuit Court of Appeals filed another opinion, reiterating the grounds of affirmance (R. 334-336).

Certiorari is now prayed by the Warden to review the judgment of the Circuit Court of Appeals.

Argument.

1. The contempt with which the respondent was charged is directly within the purview of Section 21 of the Clayton Act (28 U. S. C. A. 386), which provides:

> "Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden

to be done by him, *if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any state in which the act was committed* shall be proceeded against for his said contempt as hereinafter provided." (Italics supplied.)

The acts of contempt committed by the respondent are of such character as to constitute a criminal offense under both a statute of the United States and the laws of the State of New York, in which they were committed. The injunction restrained the respondent from committing specified acts in violation of the Sherman Anti-Trust Act. The contempts committed in violation of the injunction were new and independent offenses for which he was subject to criminal prosecution under said Act. For the same acts he was also subject to prosecution under Section 530 of the Penal Law of the State of New York.* Respondent actually was prosecuted and punished under that section for certain of the acts specified in paragraphs "5" and "6" of the information (*People* v. *Weiner*, 264 N. Y. 534).

---

* Section 530 of the Penal Law provides:

"*Coercing another person a misdemeanor.* A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor."

Where the contempt is in disobedience of a decree of the District Court, and also constitutes an independent criminal offense, the contemner is proceeded against as provided in Section 22 of the Clayton Act (28 U. S. C. A. §387) which reads, in part, as follows:

> "In all cases within the purview of this Act such trial may be by the court, or upon demand of the accused, by a jury;
>
> If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided, or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months."

Since Sections 21 and 22 of the Clayton Act are applicable, the respondent could not be sentenced to imprisonment for a term in excess of six months. His sentence to imprisonment for two years was therefore void to the extent that it was in excess of six months.

The petitioner contends that Sections 21 and 22 are applicable only to violations of decrees entered in suits and actions brought by private parties. Violations of a decree entered in a suit brought by the United States, petitioner argues, even though the acts of contempt constitute independent criminal offenses, are not within the scope of Sections 21 and 22. This limited construction of Sections 21 and 22

of the Clayton Act is predicated upon Section 24 of the Clayton Act (28 U. S. C. A. 389), which provides:

> "Nothing contained in sections 386 to 388 and 390 of this title (Sections 21 to 23 and 25 of the Clayton Act) shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914."

The construction contended for by the petitioner confines the applicability of Sections 21 and 22 to a restricted class of contempts. Such construction is not consistent with the reason for the enactment of these sections which was to restrict courts of equity from invading the criminal domain. Persons were not to be convicted under the guise of trials for contempt, of substantive crimes for which, if indicted, they would have a constitutional right to a trial by jury. The petitioner's interpretation would permit many persons to be summarily tried for contempts constituting substantive crimes. The test would not be, as provided in Section 21, merely whether the violation of a decree was an independent criminal offense. It would also be whether the decree violated was entered in a suit brought by a private party. If such were the purpose of Section 21 of the Clayton Act, it could easily have been expressed substantially as follows:

> "Any person who shall willfully disobey any

> lawful * * * decree or command of any district court of the United States or any court of the District of Columbia, *in a suit or action between private parties,* by doing, etc."

The petitioner's interpretation of Section 24 entirely overlooks the significance of the last portion of that section:

> "* * * but the same, and all other cases of contempts not specifically embraced within Section 386 of this title (Sec. 21 of the Clayton Act), may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914."

Those cases of contempt "not specifically embraced within Section 21" were the only ones in which the contemner was to be proceeded against and punished in conformity with the usages in law and in equity prevailing on October 15, 1914.* The phrase, "but the same, and all other cases", indicates that everything in Section 24 of the Clayton Act, preceding it, related to cases where the contempt was not specifically embraced in Section 21. The preceding exception in Section 24 dealing with violations of decrees entered in suits brought by the United States, could only refer, therefore, to cases where the contempt did not constitute an independent criminal offense. As stated by the Circuit Court of Appeals:

> "Contempt is specifically embraced within section 21 of the Clayton Act, so that it must be prosecuted under section 22 of the Act and not under section 268 of the Judicial Code, when an order or decree of the court is violated and the violation at the same time constitutes an

* That is, pursuant to the provisions of Section 268 of the Judicial Code (see Appendix, p. 16).

independent criminal offense. When these two things take place in one and the same act, then the contemner must be prosecuted under section 22 of the Act, whether or not the decree was entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United States, or by private parties. The antecedents of the word 'same' in section 24 in the sentence beginning with the words, 'but the same, and all other cases of contempt', etc., are not only the contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, but also contempts committed in disobedience of any lawful writ, process, order or decree entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, and all other cases of contempt not embraced in section 21. In other words these antecedent types of contempts, whether by private parties or the government, must be prosecuted under the law as it was when the Clayton Act was passed, but those contempts, which are specifically embraced within section 21 of the Clayton Act must be prosecuted under section 22 of the Act in which the contemner may demand a jury trial. That is, all kinds of contempt, with one exception, must be tried as they were on October 15, 1914, and that is by the court without a jury. That one exception is created and defined by sections 21, 22 and 24 of the Clayton Act and there is a good reason for the exception: A person may not be tried and convicted for the commission of a crime, even though the crime involves the violation of the decree of a court, without the right of trial by jury. This right the constitution gives him" (R. 335-336).

If there be any doubt as to the interpretation of the sections of the Clayton Act in question, they must

be construed, as a criminal statute, strictly in favor of the personal liberty of the accused. *United States* v. *Weitzel,* 246 U. S. 533, 543; *Prussian* v. *United States,* 282 U. S. 675, 677; *United States* v. *Atchison T. & S. F. Ry. Co.,* 142 F. 176, 181 (Circuit Ct. W. D. Mo., 1905).

Since the acts of contempt committed by respondent also constituted criminal offenses, they fall directly within the provisions of Section 21 of the Clayton Act, and punishment should, therefore, have been limited, as held below, to that prescribed in Section 22 of said Act.

In *United States* v. *Goldman,* 277 U. S. 229, cited by petitioner, the court did not have before it the question presented in the case at bar. The *Goldman* case merely decided that the period of limitation fixed by Section 25 of the Clayton Act did not apply to all contempts, but only to those within the purview of Sections 21 to 24 of the Clayton Act. The court did not pass upon the effect of the last phrase of Section 24. Nor did it consider whether the contempt charged constituted a crime under a statute of the United States or the laws of the state where committed.*

---

* In *Forrest* v. *United States,* 277 F. 873 (C. C. A. 9th, 1922), cited by petitioner, the court was not concerned with the punishment of the defendant, and the order violated was not entered in an equity suit under the Sherman Anti-Trust Act. In *Swepston* v. *United States,* 251 F. 205 (C. C. A. 6th, 1918), the defendant did not demand a jury trial pursuant to Section 22 of the Clayton Act. The court's brief statement concerning Sections 22 and 24 was therefore clearly *obiter.* The same is true of *United States* v. *Taliferro,* 290 F. 214 (W. D., Va., 1922), where the court specifically found that the contempt did not constitute a crime under a federal or state law.

That Sections 21, 22 and 24 of the Clayton Act were not intended to repeal the provisions of Section 268 of the Judicial Code is conceded. It is apparent not only from the decision in *Canoe Creek Coal Co.* v. *Christinson,* 281 F. 559 (D. C. Ky.,

2. The procedure followed by the District Court for Southern New York upon the trial of the respondent for contempt, or the reasons advanced for the waiver by the respondent of a jury trial* are of no materiality. The sole question for consideration below was the source of the trial court's power to punish for contempt and whether that power was properly exercised.

3. If a sentence in excess of six months was beyond the power of the trial court, the respondent's consent to the sentence could not serve to enlarge its powers. An order in excess of the authority or jurisdiction of the court, even though issued with the consent of the parties, is void and subject to direct or collateral attack at any time. *Mansfield* v. *Swan,* 111 U. S. 379; *Chicago, B. & Q. Ry. Co.* v. *Willard,* 220 U. S. 413; *Brougham* v. *Oceanic Steam Navigation Co.,* 205 F. 857, 860 (C. C. A. 2nd 1913).

The Petition Should be Denied.

Respectfully submitted,

SAMUEL H. KAUFMAN,
Attorney for Joseph Weiner, Respondent.

1922), reversed on other grounds 293 F. 279, 266 U. S. 42, but also from the very language of Section 24 of the Clayton Act. The sentence of a year and a day in *Creekmore* v. *United States,* 237 F. 743 (C. C. A. 8th, 1916, certiorari denied 242 U. S. 646) was imposed under Section 268 of the Judicial Code, under which the court is granted complete discretion. Under Section 22 of the Clayton Act, a sentence of that duration is clearly improper.

* Exhibit "A" (R. 303-307) was filed by the Government for the first time upon a petition for rehearing in the District Court and is, therefore, extraneous to the Record. *Maxwell Land-Grant Case,* 122 U. S. 365, 375; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 234 U. S. 667; *Gregory* v. *Pike,* 67 F. 837, 852 (C. C. A. 1st, 1895).

APPENDIX.

The Statutes Involved.

Section 21 of the Clayton Act (28 U. S. C. A., §386):

Contempts; when constituting also criminal offense. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. (Oct. 15, 1914, c. 323, §21, 38 Stat. 738.)

* * * *

Section 22 of the Clayton Act (28 U. S. C. A., §387):

Same; procedure; bail; attachment; trial, punishment. Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein, sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a

copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court. If the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be practicable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of sections 381 to 383, 386 to 390 of this title, section 412 of Title 18, section 52 of Title 29 and sections 12 to 27 of Title 15, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the

United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. In any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance. (Oct. 15, 1914, c. 323, §§22, 38 Stat. 738.)

* * * *

Section 24 of the Clayton Act (28 U. S. C. A., §389):

Same; not specifically enumerated. Nothing contained in sections 386 to 388 and 390 of this title shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically em-

braced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (Oct. 15, 1914, c. 323, §24, 38 Stat. 739.)

* * * *

Section 268 of the Judicial Code (28 U. S. C. A., §385):

Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. §725; Mar. 3, 1911, c. 231, §268, 36 Stat. 1163.)

Paragraphs "4", "5" and "6" of the Information.

Paragraph 4. Defendants Joseph Weiner, Arthur Herbert, Charles Herbert and Sidney Rosenstein are part owners of, and/or receive payments from, the Metropolitan Poultry Feed Corporation, which now is and continuously since the entry of said decree has been, engaged in selling poultry feed to receiver, marketmen and poultry dealers in Greater New York at excessive prices. During all of said period of time,

Arthur Herbert has been an official delegate and business delegate of Local 167, Charles Herbert and Joseph Weiner have been official delegates and business representatives of Local 440 of the Poultry Schochtim Union of Greater New York, and Sidney Rosenstein has been a member of Local 167; all of said defendants have used their offices and positions in said labor unions for the purpose of coercing marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8-l of said decree, such instances being too numerous to mention; all of said defendants have threatened to cause and have caused and coerced marketmen to employ laborers in excess of their reasonable requirements, for the purpose, among others, of compelling said marketmen to buy their poultry feed exclusively from the Metropolitan Poultry Feed Corporation, in violation of Paragraph 8-g of said decree, such instances being too numerous to mention; and said defendants have spied upon marketmen for the purpose of ascertaining the source of their poultry feed, in violation of paragraph 8-h of said decree, such instances being too numerous to mention.

Paragraph 5. On or about December 21, 1932, defendant Joseph Weiner, accompanied by Jacob Roth, Harry Dratt, Hyman Dratt, and other individuals to the United States Attorney unknown, visited the SS&B Market at 1314 Cooper Avenue, Bronx, New York, and there ordered Samuel Weiner, a poultry marketman and one of the proprietors of the said SS&B Market, to rent and/or buy coops exclusively from the New Jersey Coop Company, and to cease renting and/or buying poultry coops from other sources. Defendant Joseph Weiner, threatened to injure said Samuel Weiner and the property of SS&B Market in the event that Samuel Weiner and

his business associates did not comply with said demands. Defendant Joseph Weiner thereafter, to-wit, on or about April 6, 1933, caused the SS&B Market to be wrecked and damaged and thereby caused the proprietors and employes of the SS&B Market and all other persons in the poultry industry in Greater New York to be terrified and put in fear. Defendant Joseph Weiner thereby attempted to create and did create in the minds of Samuel Weiner and his business associates in the SS&B Market a feeling of fear and terror for the purpose of preventing Samuel Weiner and all other persons engaged in the wholesale poultry business in Greater New York from buying, selling or distributing live poultry in a free, open and competitive market, in violation of paragraph 8-b of said decree.

Paragraph 6. During the period from December, 1932, to and including April, 1933, defendant Joseph Weiner used his position and office as an official delegate and business representative of Local 440 of the Official Orthodox Slaughterers of America, Inc., for the purpose of coercing Samuel Weiner and other marketmen to buy their poultry and other commodities necessary to the poultry business from particular sellers in the manner described in paragraph 6 hereinabove, in violation of paragraph 8-l of said decree. During or about the month of November, 1932, defendant Joseph Weiner caused, coerced and compelled the SS&B Market to employ laborers in excess of their reasonable requirements, upon discovering that the said SS&B Market was obtaining poultry coops which are used in transporting poultry to the wholesale markets, from sources other than the New Jersey Coop Company; and said Joseph Weiner thereby violated paragraph 8-g and paragraph 8-l of said decree.

JAN 6 19
CHARLES E

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.
No. 171.

HENRY C. HILL, Warden, United States Northeastern Penitentiary,

Petitioner,

v.

UNITED STATES, *ex rel.* JOSEPH WEINER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

SAMUEL H. KAUFMAN,
Attorney for Respondent.

SETH W. RICHARDSON,
SAMUEL H. KAUFMAN,
EUGENE M. PARTER.
Of Counsel.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 3

Summary of Argument 6

ARGUMENT.

I. If petitioner's construction of that part of Section 24 of the Clayton Act relied on by it be accepted, it would result in an arbitrary discrimination. Such a construction, which would require a part of Section 24 to be declared unconstitutional, should be avoided, if possible 7

II. If Section 24 is construed as petitioner contends, then the part thereof which relates to suits brought by the United States is unconstitutional, and the judgment of the court below must still be affirmed. 13

III. The opinion of the Circuit Court of Appeals presents the proper interpretation of Sections 21 to 24 of the Clayton Act inclusive..... 15

IV. The procedure followed at the trial of the contempt is of no materiality here 20

V. Respondent's consent, if given, to the imposition of a sentence in excess of six months, does not preclude

PAGE

him from attacking the sentence on the ground that it exceeds six months 20

CONCLUSION. The judgment appealed from should be affirmed 21

APPENDIX, The Statutes Involved..... 22

Clayton Act, Section 21 (28 U. S. C. A., § 386)... 22
Clayton Act, Section 22 (28 U. S. C. A., § 387) 22
Clayton Act, Section 24 (28 U. S. C. A., § 389) 24
Judicial Code, Section 268 (28 U. S. C. A., § 385) .. 25
Penal Law of New York, Section 530 25
Paragraphs "4", "5", and "6" of the Information ... 26

Citations.

Cases:

Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U. S. 37..... 8
Bessette v. W. B. Conkey Co., 194 U. S. 324, 328..... 9
Brougham v. Oceanic Steam Navigation Co., 205 F. 857, 860 (C. C. A. 2)..... 21
Canoe Creek Co. v. Christinson, 281 F. 559 (D. C. Ky.) 19
Carter v. Carter Coal Co., 298 U. S. 238, 312..... 14
Chapman & Dewey Lumber Co. v. St. Francis Levee District, 234 U. S. 667 20
Chicago B. & Q. Ry. Co. v. Willard, 220 U. S. 413..... 21
Colgate v. Harvey, 296 U. S. 404, 423 9
Creekmore v. United States, 237 F. 743 (C. C. A. 8, certiorari denied 242 U. S. 646) 19
DeBeukelaer v. People, 25 Ill. App. 460..... 9

PAGE

Dorchy v. Kansas, 264 U. S. 286, 290 14
Duplex Printing Press Co. v. Deering, 254 U. S. 443... 8
Ex Parte Mallon 16, Idaho, 737, 102 Pac. 374..... 12
Forrest v. United States, 277 F. 873 (C. C. A. 9)..... 19
Fox v. Capital Co., 57 Sup. Ct., 57 (Oct. Term, 1936)... 9
Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 441. 9
Gregory v. Pike, 67 F. 837, 852 (C. C. A. 1)..... 20
Gulf Colorado & Santa Fe Railway Co. v. Ellis, 165 U. S. 150, 159 12
Hayes v. Missouri, 120 U. S. 68, 81 8
Heiner v. Donnan, 285 U. S. 312, 326..... 7
Hurtado v. California, 110 U. S. 516, 535 7
In re Kahn, 204 Fed. 581 (C. C. A. 2)..... 9
Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379.... 21
Maxwell Land-Grant Case, 122 U. S. 365, 375..... 20
Michaelson v. U. S. 266 U. S. 42, 65 8
Missouri Pacific Railroad Co. v. Boone, 270 U. S. 466, 472 13
Nichols v. Coolidge, 274 U. S. 531, 542..... 7
Penal Law, Section 530 25
People v. Weiner, 264 N. Y. 534..... 16
Prussian v. United States, 282 U. S. 675, 677 18
Radio Corporation of America v. Lord, 28 F. (2d) 257.. 8
Russian Volunteer Fleet v. United States, 282 U. S. 481, 492 13
Ryals v. United States, 69 Fed. (2d) 946, (C. C. A. 5).. 12
Smyth v. Ames, 169 U. S. 466 7
Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 559-560 13
Swepston v. United States, 251 F. 205, (C. C. A. 6)..... 19
United States v. Armstrong, 265 Fed. 683, 691 (D. C. Indiana) 7
United States v. Bennett, 232 U. S. 299, 303..... 13

PAGE

United States v. Goldman, 277 U. S. 299 19
United States v. New York, N. H. & H. R. Co., 165 F. 742 (C. C. D. Mass.) 9, 10
United States v. Standard Brewery, Inc., 251 U. S. 210, 220 13
United States v. Taliaferro, 290 F. 214 (D. C. Va.) 19
United States v. Weitzel, 246 U. S. 533, 543 18
United States v. Yount, 267 Fed. 861, 863 (D. C. Pa.) .. 7
Utah Power & Light Co. v. Pfost, 286 U. S. 165, 185 14

Statutes:

Clayton Act, Section 16 (15 U. S. C. A., §26) 8
Clayton Act, Section 21 (28 U. S. C. A., § 386) 22
Clayton Act, Section 22 (28 U. S. C. A., § 387) 22
Clayton Act, Section 24 (28 U. S. C. A., § 389) 24
Clayton Act, Section 27 (15 U. S. C. A., § 27) 13, 14
Judicial Code, Section 248a (28 U. S. C. A., § 347a) 2
Judicial Code, Section 268 (28 U. S. C. A., § 385) 25
Penal Law of New York, Section 530 25

Congressional Reports:

48 Congressional Record, Pt. 9, pp. 8798, 8807—62nd Congress, 2nd Session 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 171.

HENRY C. HILL, Warden, United States Northeastern Penitentiary,

Petitioner,

v.

UNITED STATES, ex rel. JOSEPH WEINER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent's Brief.

Opinions Below.

The opinion of the District Court for Middle Pennsylvania, filed June 25, 1935, is reported in 11 Fed. Supp. 195 (R. 146-149).

The majority and dissenting opinions of the Circuit Court of Appeals for the Third Circuit filed January 8, 1936, are reported in 84 F. (2d) 27 (R. 163-169). The opinion of the Circuit Court of Appeals, Third Circuit on rehearing, filed June 8, 1936, is reported in 84 F. (2d) 31 (R. 176-179).

Jurisdiction.

Jurisdiction is invoked under Section 248 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347-a). The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 179). The petition for a writ of certiorari was filed July 8, 1936 and was granted October 12, 1936 (R. 180).

Questions Presented.

(1) Whether the limitation of six months on sentences for criminal contempt, as provided in Sections 21 and 22 of the Clayton Act (28 U. S. C. A., § 386, 387) is applicable to contempts for violation of a decree entered in a suit brought by the United States, *where the contumacious acts also constitute criminal offenses under a Statute of the United States or under the laws of the State in which such acts were committed;* or whether such contempts are excepted from the provisions of Sections 21 and 22 of the Clayton Act, by Section 24 of said Act (28 U. S. C. A., § 389).

(2) Whether that part of Section 24 of the Clayton Act (28 U. S. C. A., § 389) which relates to suits brought or prosecuted in the name or on behalf of the United States, if given the construction for which petitioner contends, results in an arbitrary discrimination depriving respondent of his liberty without due process of law.

Statutes Involved.

The statutes involved, Sections 21, 22 and 24 of the Clayton Act (28 U. S. C. A., § 386, 387, 389) and Section 268 of the Judicial Code (28 U. S. C. A., § 385), are printed in an appendix hereto.

Statement.

The respondent, Joseph Weiner, was convicted of criminal contempt, for violation of a decree of the United States District Court for Southern New York, entered February 6, 1932, in a suit in equity under the Sherman Anti-Trust Act, brought by the United States against the Greater New York Live Poultry Chamber of Commerce, and others, including the respondent (affirmed sub. nom. *"Local 167 et al.* v. *United States."* 291 U. S. 293) (R. 3; Ex. 10, R. 56-69). The decree adjudged that 99 defendants, including the respondent, had participated in a conspiracy to restrain and monopolize interstate commerce in live poultry, in violation of the Sherman Anti-Trust Act; and enjoined the commission of certain specified acts, including, *inter alia*, the coercion of marketmen "to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular seller thereof" (R. 3, 7-11).*

By information filed July 31, 1933, the United States Attorney for Southern New York, accused the respondent and others of criminal contempt, alleging that the cited defendants had committed specified acts of coercion and intimidation in violation of the said decree. These acts are separately described in separately numbered paragraphs of the information (R. 17-30).

The District Court for Southern New York found the respondent guilty of criminal contempt in the commission

---

* Prior to the granting of this injunction respondent and others had been indicted for violation of the Sherman Anti-Trust Act. The indictment was dismissed as against the respondent at the close of the government's case (R. 94).

of the acts specified in paragraphs "4," "5" and "6" of the information (R. 5; 21-22; 62-63).

Paragraph "4" charged the respondent with using his position in Local 440 of the Poultry Schochtim Union of Greater New York, a labor union: to coerce marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation; to coerce marketmen to employ workmen in excess of their reasonable requirements, "for the purpose among others of compelling said marketmen to buy their feed exclusively from the Metropolitan Feed Corporation"; and to spy upon marketmen for the same purpose (R. 21).

Paragraph "5" of the information charged the respondent with visiting the S. S. & B. Market at 1314 Cooper Ave., Bronx, N. Y., and threatening to injure one of its proprietors, and the property of said market, unless the proprietors thereof bought poultry coops exclusively from the New Jersey Coop Company; and with thereafter causing the S. S. & B. Market to be wrecked and damaged, and the proprietors, employees of the S. S. & B. Market and other persons in the poultry trade in Greater New York to be terrified and put in fear (R. 21-22).

Paragraph "6" of the information charged the respondent with using his position as an official delegate of Local 440 of the Orthodox Slaughterers of America, Inc., to coerce Sam Weiner and others to buy their poultry and other commodities from particular sellers, and to employ laborers in excess of their reasonable requirements (R. 22). (Paragraphs "4," "5" and "6" of the information are printed in full in the appendix hereto, pp. 26-28).

The conviction for criminal contempt followed a trial before the District Court for Southern New York, the respondent having waived a trial by jury (R. 5).

Certain of the acts specified in paragraphs "5" and "6" of of the information were also the basis of a criminal prosecution against the respondent for violation of Section 530 of the Penal Law of the State of New York,* which resulted in the respondent's conviction and sentence in the State Court for an indeterminate term of imprisonment of six months to three years (R. 117, 122-123). (*People* v. *Weiner*, 264 N. Y. 534; two judges dissenting.) The respondent was serving this sentence at the time of the trial in the Federal Court for criminal contempt (R. 45, 117).

The respondent was originally sentenced by the United States District Court for Southern New York to serve six months in Detention Headquarters in the City of New York for the contempts charged in paragraph "4" of the information, and two years in the penitentiary for the contempts charged in paragraphs "5" and "6" (R. 5, 66-67).

On June 5, 1934, upon respondent's application, the sentence as to paragraph "4" was modified to "one year and a day in the penitentiary, sentence on paragraph "4" to run concurrently with sentence on paragraphs 5 and 6" (R. 5, 143, 146).

Upon completion of his prison term for violation of Section 530 of the Penal Law of the State of New York,† respondent was committed to the United States Northeastern Penitentiary at Lewisburg, Pa. (R. 11, 12-13). After serving six months of his sentence at Lewisburg, respondent sought his release by petition for a writ of habeas corpus filed in the United States District Court for Middle Pennsylvania, alleging that the sentence of the United States District Court for

---

* Section 530 of the Penal Law is printed in the appendix hereto, page 25.

† The respondent was imprisoned ten months for violation of this Section of the Penal Law.

Southern New York was void, and contrary to Section 22 of the Clayton Act, to the extent that it was in excess of six months (R. 3-6). His petition was granted and his discharge ordered (R. 146-150).

The Circuit Court of Appeals, Third Circuit, affirmed, one judge dissenting (R. 163-169). Upon a rehearing, granted on the petition of the Warden, the Circuit Court of Appeals filed a unanimous opinion, reiterating the grounds of affirmance (R. 176-179).

Summary of Argument.

I. If petitioner's construction of that part of Section 24 of the Clayton Act relied on by it be accepted, it would result in an arbitrary discrimination. Such a construction, which would require a part of Section 24 to be declared unconstitutional, should be avoided, if possible.

II. If Section 24 is construed as petitioner contends, then the part thereof which relates to suits brought by the United States is unconstitutional, and the judgment of the Court below must still be affirmed.

III. The opinion of the Circuit Court of Appeals presents the proper interpretation of Sections 21 to 24 of the Clayton Act inclusive.

IV. The procedure followed at the trial of the contempt is of no materiality here.

V. Respondent's consent, if given, to the imposition of a sentence in excess of six months, does not preclude him from attacking the sentence on the ground that it exceeds six months.

ARGUMENT.

I.

If petitioner's construction of that part of Section 24 of the Clayton Act relied on by it be accepted, it would result in an arbitrary discrimination. Such a construction, which would require a part of Section 24 to be declared unconstitutional, should be avoided, if possible.

The petitioner contends that Sections 21 and 22 of the Clayton Act are applicable, by reason of the provisions of Section 24 of said Act, only to violations of decrees entered in suits and actions brought by private parties. Violations of decrees entered in a suit brought by the United States, petitioner argues, even though the acts of contempt constitute independent criminal offenses, are not within the scope of Sections 21 and 22. This construction, we submit, results in an arbitrary discrimination and a denial of due process of law to the respondent.

Due process requires that "no greater burdens shall be laid upon one than is laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses" *Barbier* v. *Connolly*, 113 U. S. 27, 31. Thus an arbitrary and discriminatory classification by Congress is repugnant to the Fifth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Smyth* v. *Ames*, 169 U. S. 466; *Hurtado* v. *California*, 110 U. S. 516, 535; *United States* v. *Armstrong*, 265 Fed. 683, 691 (D. C. Ind.); *United States* v. *Yount*, 267 Fed. 861, 863 (D. C. Pa.). The Constitutional prohibition against arbitrary and discriminatory

legislation applies equally to privileges conferred as well as to burdens imposed. *Hayes* v. *Missouri*, 120 U. S. 68, 81.

What is the nature of the arbitrary discrimination which results if the petitioner's interpretation of Section 21 be accepted? In a prosecution for contempt for violation of a decree entered in a suit commenced by a private party, where the contempt also constitutes an independent criminal offense, the defendant, petitioner concedes, is entitled to a trial by jury and if found guilty can be sentenced to a maximum of six months' imprisonment. (Section 22 of the Clayton Act.) Yet, in a prosecution for contempt for violation of a decree entered in a suit brought by the United States, the defendant, petitioner contends, is not entitled to a jury trial and may be sentenced in the discretion of the court—although the decrees violated, and the acts of contempt committed, be identical in both cases.* Under this interpretation, the defendants' rights are not dependent solely upon the character of the offense committed. Instead, an extraneous consideration, the identity of the party plaintiff in the suit in which the decree violated was entered is made a determining factor.

The nature of criminal contempt, to which Section 22 of the Clayton Act "relates exclusively," (*Michaelson* v. *U. S.*, 266 U. S. 42, 65) does not permit differences in procedure and punishment based upon so arbitrary a factor as the identity of the plaintiff in the suit in which the decree violated

---

* The same injunctive relief may be secured by a private party as by the United States under Section 16 of the Clayton Act. (15 U. S. C. A. § 26) *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 53; *Radio Corporation of America* v. *Lord*, 28 F. (2d) 257, (C. C. A. 3).

was entered.† Criminal contempt for violation of a Court's decree results only where there is an affront to the dignity of the court. *Fox* v. *Capital Co.*, 57 Sup. Ct. 57 (Oct. Term, 1936); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441; *De Beükelaer* v. *People*, 25 Ill. App. 460. And the purpose of punishment for criminal contempt is to enforce respect for and obedience to the court's orders, regardless of the identity of the parties securing the same.* The *only* permissible basis, "founded upon pertinent and real differences," for a distinction between the punishments which can be imposed upon defendants, is therefore the degree of seriousness of the affront to the court. Except when its sovereign prerogatives are threatened, the government must be subjected to the same limitations as any other litigant. It is the dignity of the court, and not any sovereign prerogative, which is threatened by a criminal contempt. And the dignity of the court is in no greater need of vindication when the United States is the plaintiff in the suit in which the decree violated is entered, than when a private party is the plaintiff.

In *United States* v. *New York, N. H. & H. R. Co.*, 165 F. 742 (C. C. D. Mass.) the court had before it for consider-

---

† "The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. * * * 'Mere difference, is not enough'." *Colgate* v. *Harvey*, 296 U. S. 404, 423.

* A sentence to a fixed and absolute term of imprisonment for contempt such as that which can be imposed under Section 22 of the Clayton Act, can be justified only by showing that it was imposed in a proceeding for criminal contempt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *In re Kahn*, 204 Fed. 581 (C. C. A. 2).

ation Section 1 of the Sherman Anti-Trust Act, which provided in part that the "government could file a certificate of general public importance" in any suit in equity under the Sherman Anti-Trust Act, and ask for a court of three judges, with preference over other cases. It was contended by the respondents (p. 745) that "the statute in question is so framed that it is limited to a particular class of cases, and operative only at the request of the United States, and can never be called on by a respondent, and never by either party in suits brought by others than the United States." The Court said in answer to this contention (p. 745):

> "There can be no question that this makes an apparent discrimination, yet we are unable to perceive that it is injurious to the respondents, or any other possible respondents, in any legal sense of the word. * * * Therefore, we say the statute under which the Attorney General filed his certificate is not injurious because, on the whole, when availed of, it operates for the protection of the interests of respondents, more than for those of the United States."

In the case at bar, however, the injurious effect of the discrimination which would result, if the petitioner's contention be sustained, is apparent. Similar acts violative of like decrees may result in one case in a sentence of indeterminate and unlimited length, and the denial of a jury trial; and in another case, differing in no essentials, in a maximum sentence of six months' imprisonment, and the granting of a jury trial. No claim can be made here as in the *New York, N. H. & H. R. Co.* case, *supra*, that this statute would "operate for the protection of the interests of respondents more than for those of the United States." On the other hand, if the interpretation given this statute by the Circuit Court of Appeals be adopted, then the United States and all

other complainants will stand upon the same footing of equality without a substantial ground for complaint by anyone.

The classification of contempt suits contended for by the petitioner is warranted neither by reason, logic, the nature of criminal contempt, nor the objectives sought by the enactment of Sections 21-24 of the Clayton Act. The purpose of these sections, in fact, rebuts any suggestion that the discrimination in favor of the United States is reasonable.* These sections of the Clayton Act were designed to prevent courts of equity from invading the criminal domain and under the guise of trials for contempt convicting persons of substantive crimes for which, if indicted, they would have a constitutional right to trial by jury. (48 Congressional Record, Pt. 9, pp. 8798, 8807—62nd Congress, 2nd Session.) The means adopted to effect that purpose are: (a) a trial "by the court, or, upon demand of the accused, by a jury" and (b) conformity of such trial "as near as may be, to the practice in criminal cases prosecuted by indictment or upon information." (Section 22 of the Clayton Act.)

The applicability of these sections is made dependent upon whether the contempt is also an independent crime under a state or federal statute (Section 21 of the Clayton Act). The character and nature of the contempt are thus the basis of the punishment imposed. Matters disconnected with the

---

* No reason is advanced in the majority report of the committee on the judiciary for the exception contended for by the petitioner. Any statement upon the floor of Congress which tends to support an interpretation resulting in the unconstitutionality of the statute must be disregarded.

nature of the crime committed, such as the identity of the complainant, should therefore, be disregarded. (*Ex parte Mallon 16, Idaho,* 737, 102 Pac. 374). Petitioner's interpretation, we submit, is contrary to the general purpose of Sections 21-24 of the Clayton Act, as well as the nature of criminal contempt.

In addition, despite the provisions of Section 22 of the Clayton Act, which limit the punishment for contempt, most probably because of the likelihood of the defendant being punished again for the substantive crime involved, the petitioner would have the respondent serve a two year sentence for contempt in the federal penitentiary after serving a prison term in New York for the commission of certain of the acts constituting the contempt.*

No substantial and real differences are suggested by the purpose of the Clayton Act, which permit the imposition of a penalty upon one individual "which is not imposed upon others guilty of like delinquency." *Gulf Colorado & Santa Fe Railway Co.* v. *Ellis,* 165 U. S. 150, 159. A difference in the identity of the complainant surely provides no reasonable basis for the difference in procedure and punishment which results if petitioner's interpretation be accepted. Likewise a reason advanced in Congress, that "the anti-trust statutes

---

* The trial court completely disregarded the principle upon which punishment under Section 268 of the Judicial Code (28 U. S. C. A. 385) should be administered, as well as the express provisions of Section 22 of the Clayton Act. (28 U. S. C. A. 387.) In *Ryals* v. *United States,* 69 Fed. (2d) 946, (C. C. A. 5) it was stated at page 948: "It follows also that the six-month limit of imprisonment for contempt contained in section 387 of 28 U. S. C. A., does not apply here, though it ought to have great weight in punishing criminal contempts under section 385 of 28 U. S. C. A."

are still in a formative stage", is legally inadequate to justify the discrimination. Mere facilitation of administration will not justify an otherwise arbitrary and discriminatory classification. *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 559-560.

An interpretation such as that sought by the petitioner, which would require the statute to be declared arbitrary, discriminatory and unconstitutional should be avoided. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; *Missouri Pacific Railroad Co.* v. *Boone,* 270 U. S. 466, 472; *United States* v. *Standard Brewery, Inc.,* 251 U. S. 210, 220; *United States* v. *Bennett,* 232 U. S. 299, 303.

II.

If Section 24 is construed as petitioner contends, then the part thereof which relates to suits brought by the United States is unconstitutional, and the judgment of the court below must still be affirmed.

We need not repeat here our argument that that part of Section 24 which relates to suits brought or prosecuted by the United States, if given the construction for which the petitioner contends, is unconstitutional by reason of the arbitrary discrimination which results. There remains, however, the question whether, if that part of Section 24 is declared unconstitutional, the remainder of Section 24 and Sections 21 and 22 will still be in full force and effect.

The express provisions of Section 27 of the Clayton Act (15 U. S. C. A. 27) permit separability. This section provides:

> "If any clause, sentence, paragraph, or part of this Act, shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered."

Although the statute thus prescribes the rule by which construction shall be governed, "the rule is not an inexorable mandate". *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312, *Dorchy* v. *Kansas*, 264 U. S. 286, 290, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 185. It does create, however, a presumption in favor of divisibility and shifts the burden to the petitioner to show its inseparability. *Carter* v. *Carter Coal Co., supra; Utah Power & Light Co.* v. *Pfost, supra.* The purpose of Sections 21-24 of the Clayton Act, to prevent courts of equity from invading the criminal domain, and to grant the defendant a jury trial when the contempt in violation of a decree constitutes an independent criminal offense, is consistent with the elimination from Section 24 of said Act of any exception in favor of the United States. The entire statute should not be sacrificed by reason of the invalidity of the exception. As stated in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 at p. 185:

> "We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity. *Field* v. *Clark*, 143 U. S. 649, 696-697; *People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y. 48, 60-63; 129 N. E. 202."

The concluding sentence of Section 24, which provides that in all cases not "specifically embraced within Section 21" the contemner is to be proceeded against and punished in conformity with the usages in law and in equity, is consistent with separability. The cases embraced by the very general terms of Section 21 include all cases of contempt in violation of decrees, whether entered in suits brought by the United States or a private party, "if the contempt constituted also a criminal offense under any statute of the United States, or under the laws of any statute under which the act was committed."

III.

The opinion of the Circuit Court of Appeals presents the proper interpretation of Sections 21 to 24 of the Clayton Act inclusive.

The contempt with which the respondent was charged is directly within the purview of Section 21 of the Clayton Act (28 U. S. C. A. 386).

The acts of contempt committed by the respondent are of such character as to constitute a criminal offense under both a statute of the United States and the laws of the State of New York, in which they were committed. The injunction restrained the respondent from committing specified acts in violation of the Sherman Anti-Trust Act. The contempts committed in violation of the injunction were new and independent offenses for which he was subject to criminal prosecution under said Act. For the same acts he was also subject to prosecution under Section 530 of the Penal Law of the State of New York. Respondent actually was prosecuted

and punished under that section for certain of the acts specified in paragraphs "5" and "6" of the information (*People* v. *Weiner*, 264 N. Y. 534).

Where the contempt is in disobedience of the decree of the District Court and also constitutes an independent criminal offense, the contemner is proceeded against as provided in Section 22 of the Clayton Act, which specifically grants him the right to a trial by jury and limits his punishment to a maximum of six months' imprisonment. Since Sections 21 and 22 of the Clayton Act are applicable, the respondent could not be sentenced to imprisonment for a term in excess of six months. His sentence to imprisonment for two years was, therefore, void to the extent that it was in excess of six months.

The petitioner contends, however, that Section 24 of the Clayton Act limits the application of Sections 21 and 22 to prosecutions for criminal contempts in violation of decrees obtained by private parties, and that contempts in violation of decrees obtained by the United States are punished in conformity to the usages in law and in equity. If such were the purpose of Section 21 of the Clayton Act, it could easily have been expressed substantially as follows:

> "Any person who shall willfully disobey any lawful * * * decree or command of any district court of the United States or any court of the District of Columbia, *in a suit or action between private parties;* by doing, etc."

Section 21, however, is general and all inclusive. It applies to contempts committed by "*any* person" in violation of "*any* lawful writ, process, order, rule, decree or demand of any District Court of the United States or any court of the District of Columbia" where the contempt also constitutes an independent criminal offense (Italics ours).

The petitioner's interpretation of Section 24 entirely overlooks the significance of the last portion of that section:

> "* * * but the same, and all other cases of contempt not specifically embraced within Section 386 of this title (Sec. 21 of the Clayton Act), may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914."

Those cases of contempt "not specifically embraced within Section 21" were the only ones in which the contemner was to be proceeded against and punished in conformity with the usages in law and in equity prevailing on October 15, 1914.* The phrase, "but the same, and all other cases," indicates that everything in Section 24 of the Clayton Act, preceding it, related to cases where the contempt was not specifically embraced within Section 21. The preceding exception in Section 24 dealing with violations of decrees entered in suits brought by the United States, could only refer, therefore, to cases where the contempt did not constitute an independent criminal offense. Cases, such as the instant case, where the contempt committed in violation of a decree is also an independent criminal offense are "specifically embraced" within Section 21. As stated by the Circuit Court of Appeals:

> "Contempt is specifically embraced within section 21 of the Clayton Act, so that it must be prosecuted under section 22 of the Act and not under section 268 of the Judicial Code, when an order or decree or the court is violated and the violation at the same time constitutes an independent criminal offense. When these two things take place in one and the same act, then the contemner must be prosecuted under section 22 of the Act, whether or not the decree was entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United

---

* That is, pursuant to the provisions of Section 268 of the Judicial Code. (Appendix, p. 25).

States, or by private parties. The antecedents of the word 'same' in section 24 in the sentence beginning with the words 'but the same,' and all other cases of contempt,' etc., are not only the contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, but also contempts committed in disobedience of any lawful writ, process, order or decree entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, and all other cases of contempt not embraced in section 21. In other words these antecedent types of contempts, whether by private parties or the government, must be prosecuted under the law as it was when the Clayton Act was passed, but those contempts, which are specifically embraced within section 21 of the Clayton Act must be prosecuted under section 22 of the Act in which the contemner may demand a jury trial. That is, all kinds of contempt, with one exception, must be tried as they were on October 15, 1914, and that is by the court without a jury. That one exception is created and defined by sections 21, 22 and 24 of the Clayton Act and there is a good reason for the exception: A person may not be tried and convicted for the commission of a crime, even though the crime involves the violation of the decree of a court, without the right of trial by jury. This right the constitution gives him" (R. 178).

If there be any doubt as to the interpretation of the sections of the Clayton Act in question, they must be construed, as a criminal statute, strictly in favor of the personal liberty of the accused. *United States* v. *Weitzel*, 246 U. S. 533, 543; *Prussian* v. *United States*, 282 U. S. 675, 677.

Since the acts of contempt committed by respondent also constituted criminal offenses, they fall directly within the provisions of Section 21 of the Clayton Act, and punishment should, therefore, have been limited, as held below, to that prescribed in Section 22 of said Act.

In *United States* v. *Goldman*, 277 U. S. 229, cited by petitioner, the court did not have before it the question pre-

sented in the case at bar. The *Goldman* case merely decided that the period of limitation fixed by Section 25 of the Clayton Act did not apply to all contempts, but only to those within the purview of Section 21 to 24 of the Clayton Act. The court did not pass upon the effect of the last phrase of Section 24. Nor did it consider whether the contempt charged constituted a crime under a statute of the United States or the laws of the State where committed. Likewise, it did not pass upon the constitutionality of Section 24, if petitioner's interpretation thereof be accepted.*

---

* In *Forrest* v. *United States*, 277 F. 873 (C. C. A. 9), cited by petitioner, the court was not concerned with the punishment of the defendant, and the order violated was not entered in an equity suit under the Sherman Anti-Trust Act. In *Swepston* v. *United States*, 251 F. 205, (C. C. A. 6), the defendant did not demand a jury trial pursuant to Section 22 of the Clayton Act. The court's brief statement concerning Sections 22 and 24 was therefore clearly *obiter*. The same is true of *United States* v. *Taliaferro*, 290 F. 214 (D. C. W. D., Va.), where the court specifically found that the contempt did not constitute a crime under a federal or state law.

That Sections 21, 22 and 24 of the Clayton Act were not intended to repeal the provisions of Section 268 of the Judicial Code is conceded. It is apparent not only from the decision in *Canoe Creek Co.* v. *Christinson*, 281 F. 559 (D. C. Ky.), reversed on other grounds 293 F. 379, 266 U. S. 42, but also from the very language of Section 24 of the Clayton Act. The sentence of a year and a day in *Creekmore* v. *United States*; 237 F. 743 (C. C. A. 8, certiorari denied 242 U. S. 646) was imposed under Section 268 of the Judicial Code, under which the court is granted complete discretion. Under Section 22 of the Clayton Act, a sentence of that duration is clearly improper.

IV.

The procedure followed at the trial of the contempt is of no materiality here.

The procedure followed by the District Court for Southern New York upon the trial of the respondent for contempt, or the reasons advanced for the waiver by the respondent of a jury trial* are of no materiality. The sole question for consideration below was the source of the trial court's power to punish for contempt and whether that power was properly exercised.

V.

Respondent's consent, if given, to the imposition of a sentence in excess of six months, does not preclude him from attacking the sentence on the ground that it exceeds six months.

Even if it be assumed that respondent consented to a sentence of two years, which we deny, as a sentence in excess of six months was beyond the power of the trial court, the respondent's consent thereto could not serve to enlarge its powers. An order in excess of the authority or jurisdiction of the court, even though issued with the consent of the

---

* Exhibit "A" (R. 155-157) was filed by the Government for the first time upon a petition for rehearing in the District Court and is, therefore, extraneous to the Record. *Maxwell Land-Grant Case*, 122 U. S. 365, 375; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 234 U. S. 667; *Gregory v. Pike*, 67 F. 837, 852 (C. C. A. 1st).

parties, is void and subject to direct or collateral attack at any time. *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379; *Chicago, B. & Q. Ry. Co. v. Willard,* 220 U. S. 413; *Brougham v. Oceanic Steam Navigation Co.,* 205 F. 857, 860 (C. C. A. 2).

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted,

SAMUEL H. KAUFMAN,
Attorney for Respondent.

SETH W. RICHARDSON,
SAMUEL H. KAUFMAN,
EUGENE M. PARTER.
Of Counsel.

APPENDIX.

The Statutes Involved.

Section 21 of the Clayton Act (28 U. S. C. A., §386):

Contempts; when constituting also criminal offense. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. (Oct. 15, 1914, c. 323, §21, 38 Stat. 738.)

* * * *

Section 22 of the Clayton Act (28 U. S. C. A., §387):

Same; procedure; bail; attachment; trial, punishment. Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein, sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, should be served upon the person charged, with sufficient promptness to enable him to prepare for and make

return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court. If the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be practicable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of sections 381 to 383, 386 to 390 of this title, section 412 of Title 18, section 52 of Title 29 and sections 12 to 27 of Title 15, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt,

or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. In any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance. (Oct. 15, 1914, c. 323, §§22, 38 Stat. 738.)

* * * *

Section 24 of the Clayton Act (28 U. S. C. A., § 389):

Same; not specifically enumerated. Nothing contained in sections 386 to 388 and 390 of this title shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (Oct. 15, 1914, c. 323, § 24, 38 Stat. 739.)

Section 268 of the Judicial Code (28 U. S. C. A., § 385):

Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. § 725; Mar. 3, 1911, c. 231, § 268, 36 Stat. 1163.)

Section 530 of the New York Penal Law:

Coercing another person a misdemeanor. A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

Paragraphs "4", "5" and "6" of the Information.

Paragraph 4. Defendants Joseph Weiner, Arthur Herbert, Charles Herbert and Sidney Rosenstein are part owners of, and/or receive payments from, the Metropolitan Poultry Feed Corporation, which now is and continuously since the entry of said decree has been, engaged in selling poultry feed to receiver, marketmen and poultry dealers in Greater New York at excessive prices. During all of said period of time, Arthur Herbert has been an official delegate and business delegate of Local 167, Charles Herbert and Joseph Weiner have been official delegates and business representatives of Local 440 of the Poultry Schochtim Union of Greater New York, and Sidney Rosenstein has been a member of Local 167; all of said defendants have used their offices and positions in said labor unions for the purpose of coercing marketmen to buy poultry feed from the Metropolitan Poultry Feed Corporation, in violation of paragraph 8-l of said decree, such instances being too numerous to mention; all of said defendants have threatened to cause and have caused and coerced marketmen to employ laborers in excess of their reasonable requirements, for the purpose, among others, of compelling said marketmen to buy their poultry feed exclusively from the Metropolitan Poultry Feed Corporation, in violation of Paragraph 8-g of said decree, such instances being too numerous to mention; and said defendants have spied upon marketmen for the purpose of ascertaining the source of their poultry feed, in violation of paragraph 8-h of said decree, such instances being too numerous to mention.

Paragraph 5. On or about December 21, 1932, defendant Joseph Weiner, accompanied by Jacob Roth, Harry Dratt,

Hyman Dratt, and other individuals to the United States Attorney unknown, visited the SS&B Market at 1314 Cooper Avenue, Bronx, New York, and there ordered Samuel Weiner, a poultry marketman and one of the proprietors of the said SS&B Market, to rent and/or buy coops exclusively from the New Jersey Coop Company, and to cease renting and/or buying poultry coops from other sources. Defendant Joseph Weiner, threatened to injure said Samuel Weiner and the property of SS&B Market in the event that Samuel Weiner and his business associates did not comply with said demands. Defendant Joseph Weiner thereafter, to-wit, on or about April 6, 1933, caused the SS&B Market to be wrecked and damaged and thereby caused the proprietors and employes of the SS&B Market and all other persons in the poultry industry in Greater New York to be terrified and put in fear. Defendant Joseph Weiner thereby attempted to create and did create in the minds of Samuel Weiner and his business associates in the SS&B Market a feeling of fear and terror for the purpose of preventing Samuel Weiner and all other persons engaged in the wholesale poultry business in Greater New York from buying, selling or distributing live poultry in a free, open and competitive market, in violation of paragraph 8-b of said decree.

Paragraph 6. During the period from December, 1932, to and including April, 1933, defendant Joseph Weiner used his position and office as an official delegate and business representative of Local 440 of the Official Orthodox Slaughterers of America, Inc., for the purpose of coercing Samuel Weiner and other marketmen to buy their poultry and other commodities necessary to the poultry business from particular sellers in the manner described in paragraph 6 herein-

above, in violation of paragraph 8-l of said decree. During or about the month of November, 1932, defendant Joseph Weiner caused, coerced and compelled the SS&B Market to employ laborers in excess of their reasonable requirements, upon discovering that the said SS&B Market was obtaining poultry coops which are used in transporting poultry to the wholesale markets, from sources other than the New Jersey Coop Company; and said Joseph Weiner thereby violated paragraph 8-g and paragraph 8-l of said decree.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1936.

Henry C. Hill, Warden, United States Northeastern Penitentiary, Petitioner, *vs.* United States *ex rel.* Joseph Weiner. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 1, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The relator, Weiner, was convicted in a federal district court for violating a decree entered against him and numerous others by that court in a suit in equity brought by the United States under the Sherman Anti-trust Act, Title 15 U. S. C. §§ 1, 2, 4. He, with others, was charged by information with the commission of several specified acts in violation of the decree, constituting criminal contempts. Upon a trial before the court sitting without a jury, he was found guilty and sentenced for certain of the contempts to imprisonment for six months in the House of Detention, and for other contempts for two years additional in the penitentiary. Upon his application and consent, the first part of the sentence was increased from six months in the House of Dentention to a year and a day in the penitentiary, but to run *concurrently* with the two years' imprisonment.

On June 5, 1935, he was committed to the penitentiary. At the end of eleven months, he applied by petition to another federal district court to be discharged on habeas corpus, on the ground that the first court was without power to sentence him for a period of more than six months; and, having served that long, that he was entitled to be set at liberty.

The district court accepted that view, granted the writ, and ordered the relator discharged. 11 F. Supp. 195. Upon appeal, the court below affirmed the order. 84 F. (2d) 27.

The case involves a consideration of §§ 21, 22 and 24 of the Clayton Act, Title 28 U. S. C. §§ 386, 387 and 389.* Section 21, so far as pertinent, provides that any person who shall willfully disobey any lawful decree of the federal district court by doing any act or thing thereby forbidden to be done by him, if of a character to constitute also a criminal offense under any statute of the United States or laws of any state in which the act was committed, shall be proceeded against as thereafter provided. Section 22 provides for trial by the court or, upon demand of the accused, by a jury. If found guilty, punishment is to be either by fine or imprisonment or both, in the discretion of the court, "but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months." Section 24, however, provides that "nothing herein contained [§§ 21, 22, 23, 25] shall be construed to relate to contempts committed in disobedience of any lawful . . . decree . . . entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one . . . may be pun-

* Sec. 21. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided. [Title 28 U. S. C. § 386.]

Sec. 22. . . . In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury: . . .

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. [Title 28 U. S. C. § 387.]

Sec. 24. Nothing herein contained [that is in §§ 21, 22, 23, 25] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. [Title 28 U. S. C. § 389.]

ished in conformity to the usages at law and in equity prevailing on October 15, 1914." If § 24 applies, the sentence was within the statutory authority of the court.

First. The court below held, and relator here contends, that the limitation of imprisonment to six months is not affected by the provisions of § 24. A similar question was before this court in *United States* v. *Goldman,* 277 U. S. 299, and was there decided contrary to the views of the court below. In that case, an information was presented by the United States to a federal district court, charging Goldman and others with criminal contempts committed by acts in violation of an injunction decreed by that court in an equity suit brought by the United States. The information was dismissed on the ground that under § 25 of the Clayton Act, the prosecution was barred by the statute of limitations. This court reversed. Section 25 provides that no proceeding for contempt shall be instituted unless begun within one year of the act complained of; but we held that the specific exception contained in § 24—"nothing herein contained"—applied to all provisions of the act relating to prosecutions for criminal contempts, and therefore applied to § 25, "as well as to the other sections", and that the one-year limitation prescribed by § 25 was without application to a case brought for the disobedience of a decree entered in a suit prosecuted by the United States.

That decision controls here. The object of § 24 clearly was to limit the application of the provisions of § 22, and the other sections named, to prosecutions for contempt arising out of cases instituted by private litigants.

Second. We find nothing in the further contention that this view of the statute results in a discrimination in the matter of punishment so arbitrary as to deny due process of law to relator. Whatever may be the restraint against discriminatory legislation imposed by the due process of law clause of the Fifth Amendment, it is not encountered by the legislation here. The constitutional power of Congress to prescribe greater punishment for an offense involving the rights and property of the United States than for a like offense involving the rights or property of a private person reasonably cannot be doubted. Compare *Pace* v. *Alabama,* 106 U. S. 583.

Judgment reversed.